

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. ~~512~~ 513

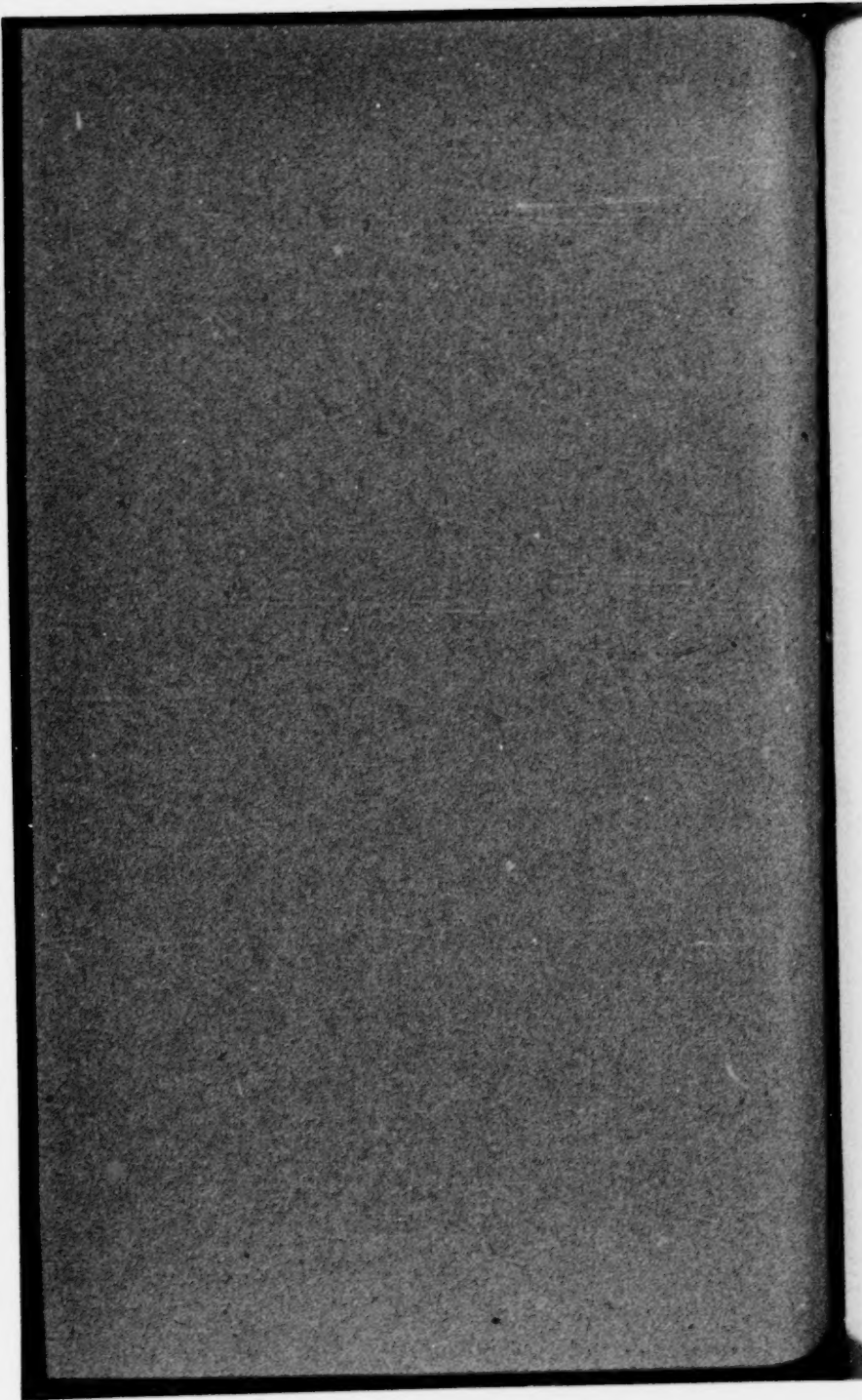
RAIL AND RIVER COAL COMPANY, APPELLANT.

WALLACE D. YAPLE, MATHEW S. HAMMOND, AND
THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUT-
ING THE INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 4, 1914.

(24,255)



(24,255)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1104.

RAIL AND RIVER COAL COMPANY, APPELLANT,

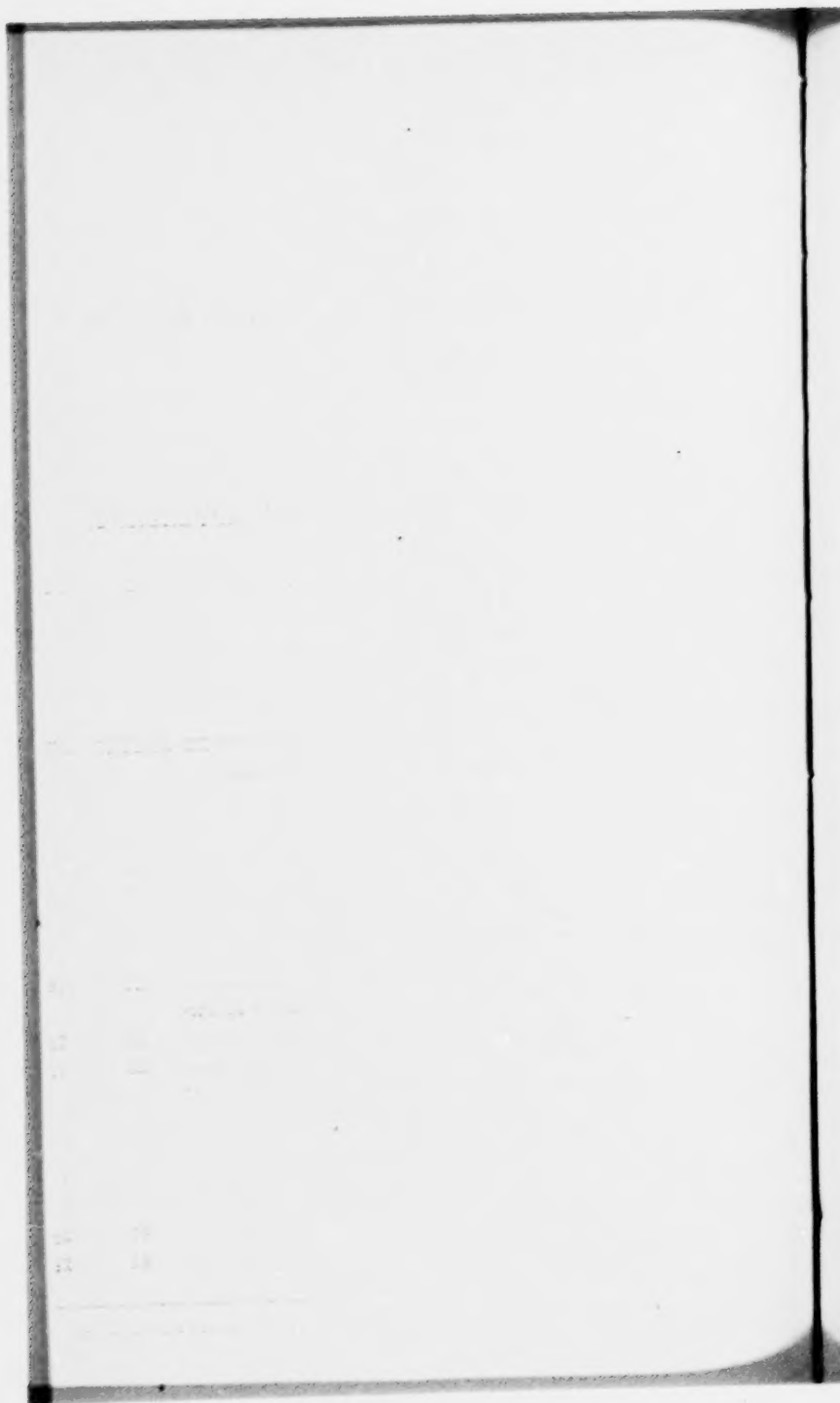
vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND
THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUT-
ING THE INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OHIO.

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UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said District, on the First Tuesday in April, being the 7th day of said Month in the year of our Lord one thousand nine hundred and Fourteen, and of the Independence of the United States of America, the one hundred and thirty-eighth, to-wit: on Saturday, the 23rd day of May, A. D. 1914.

Present:

Hon. John W. Warrington, United States Circuit Judge.

Hon. John E. Sater, United States District Judge.

Hon. John M. Killits, United States District Judge.

In Equity. No. 233.

RAIL AND RIVER COAL COMPANY

VS.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

Said action was commenced on 16th day of April, A. D. 1914, and proceeded to disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

(*Bill of Complaint. Filed April 16, 1914.*)

in the United States District Court for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

VS.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Bill of Complaint.

To the Honorable the District Judges of the Northern District of Ohio, Eastern Division:

Rail and River Coal Company, a corporation, brings this, its bill of complaint, against Wallace D. Yaple, Mathew B. Hammond and

Thomas J. Duffy at East Liverpool, Ohio, in the Eastern Division Commission of Ohio, and thereupon said plaintiff complains and alleges:

I.

Said plaintiff is and has been for a long time past a corporation organized and existing under the laws of the State of West Virginia, and is a citizen of said State of West Virginia, and a resident thereof.

II.

That the said defendants, Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy are citizens and residents of the State of Ohio, defendant Wallace D. Yaple, residing at Chillicothe, Ohio, defendant Mathew B. Hammond at Columbus, Ohio, and defendant Thomas J. Duffy at East Liverpool, Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this court.

3 Said defendants are the duly appointed, qualified and acting members of The Industrial Commission of Ohio, having been appointed as such members under and pursuant to an Act of the Legislature of the State of Ohio entitled "An Act Creating The Industrial Commission of Ohio," passed March 12, 1913, approved by the Governor of said State March 18, 1913, and duly filed in the office of the Secretary of State on March 20, 1913. Said defendant Wallace D. Yaple is Chairman and said Mathew B. Hammond is Vice-Chairman of said Commission. Said Act is set forth at length in the Session Laws of the State of Ohio for the year 1913, Volume 103, pages 95 to 110, both inclusive, to which Act, for the full text thereof, complainant begs leave to refer, as fully as though the same were at length incorporated herein.

That under and by the terms of Section 22 of said Act it is made the duty of said Industrial Commission, and it is given the power, jurisdiction and authority on and after the first day of September, 1913, to administer and enforce the general laws of the State of Ohio relating to mines, manufacturing and other establishments. Under the provisions of Sections 18, 19, 20, 21, 22 and 35 of said Act, said Commission is given extensive inquisitorial powers, and it is made the duty of all employers to furnish to said Commission information pertaining to their private business affairs, to enable it to carry into effect the provisions of said Act and the orders of said Commission made thereunder, and said employers are required to make specific answers under oath to all questions submitted to them by said Commission, and to give said Commission access to their establishments and places of business. Under the provisions of Section 36 of said Act said Commission is given authority to direct the prosecution of any action, proceeding, investigation, hearing or trial relating to matters within its jurisdiction, and upon the request of said Commission it is made the duty of the attorney general

4 of Ohio or the prosecuting attorneys of the various counties in said State to aid said Commission and prosecute under the supervision of said Commission all necessary actions or

proceedings for the enforcement of said Act, and for the punishment of all violations thereof.

III.

Said plaintiff is now and for many years last past has been actively engaged in the State of Ohio in the business of mining and selling coal, and now owns and for a long time past has owned in said State a large acreage of coal lands, consisting approximately of 32,000 acres, of the value of more than \$1,000,000.00, upon which said lands said plaintiff has four coal mines properly developed, in which it employs upward of 2,000 persons, and from which said mines said plaintiff's average daily production is about 2,800 mine cars of two tons each of coal; that among said employes of plaintiff are about 1,700 persons who are paid on the basis of the ton for mining or loading coal.

IV.

Plaintiff further shows to the court that the business of coal mining in the State of Ohio is very large; that there are about six hundred (600) coal mines in said State, in which there are employed upwards of 45,000 persons; that upwards of 36,000 tons of coal were produced in the year 1913, and there was expended in wages to said employes in said year upwards of \$23,000,000.00.

V.

Plaintiff further shows to the court that Western Pennsylvania, the States of Illinois and Indiana are likewise large producers of coal; that the mines located in these States are in close competition with each other and with the mines in the State of Ohio in the sale of the coal produced by their respective properties; that a great majority of the operatives engaged in the coal mining business in said States are members of an organization known as The United Mine Workers of America. That for many years last
5 past it has been the custom for said mine operatives, through their representatives in said organization, under arrangements made with the various coal operators in the said States, to enter into contracts with said operators for the period of two years, whereby the interests of said operatives and their employers have been subserved by securing reasonably uniform wages for the different kinds of labor performed in said mines; that the last agreement entered into was for the period of two years, expiring on April 1, 1914.

That it has been for many years last past the custom and practice of large users of coal, such as railroads and large manufacturing concerns, to make contracts for their fuel requirements by the year, and that many of said contracts expired about April 1, 1914, or will expire in the immediate future, and practically all of them prior to May 20, 1914.

VI.

Plaintiff further shows to the court that the wage agreement referred to, which expired April 1, 1914, as well as several of said agreements theretofore made, covering the wages of such mine operatives as are paid by the ton in the said States of Pennsylvania, Ohio and Indiana, provided for the screening of coal and for payment of wages at a certain price per ton for lump coal, to-wit: such coal as would pass over a bar screen of certain dimensions, wherein the bars were $1\frac{1}{4}$ inches apart; of said four States, the mines in said State of Illinois, alone, operating upon any other basis, except that in the State of Indiana the operators, at their option, paid on a mine run basis also, and plaintiff states to the court that said method of screening coal and paying the miners and loaders thereof,

6 upon the basis of such coal as will pass over said screen, is designed and well calculated to induce carefulness in mining, in that said loaders and miners exercise greater care in the manner in which charges of powder are placed to break down said coal, and in the manner in which said coal is loaded after the same is broken down, and the safety of the operatives is much enhanced because of the better condition of the roof of the mines, growing out of the smaller charges of powder used therein.

That for the reasons aforesaid, those engaged in the mining business operate their mines more economically and in a safer manner, and coal of a better grade is produced when the mines and loaders are paid upon the lump coal basis.

VII.

Plaintiff further says that by Section 970 of the General Code of Ohio, the owners and operators of coal mined in said State are required to permit their mine operatives to employ, and it is the universal custom in said State for such operatives to employ, a representative known as check weighman, whose duty and right it is to examine the scales and screening apparatus and machinery at the mine, and see the coal weighed and check such weights, and make a correct record thereof. By this law the operatives are protected and secured against any false weight or improper screening of their coal, and from any improper deductions from the coal mined or loaded by them.

VIII.

Plaintiff further shows to the court that on the 20th day of May, A. D. 1914, there will become effective a certain Act of the General Assembly of Ohio, known as Senate Bill No. 3, entitled "An Act to Regulate the Weighing of Coal at the Mines," which was duly passed by the General Assembly of Ohio on or about February 5, 1914, approved by the Governor of the State of Ohio on
7 February 17, 1914, and filed in the office of the Secretary of State on February 20, 1914, a true copy of which is hereto attached, marked "Exhibit A" and made a part hereof.

IX.

That in and by the terms of said Act it is provided that every miner and every loader of coal in any mine in this State, who, under the terms of his employment, is to be paid for mining or loading such coal on the basis of the ton, or other weight, shall be paid for such mining or loading according to the total weight of all coal contained within his car in which the same shall be removed from out of the mine, unless the contents of such car when so removed shall contain a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the said The Industrial Commission of Ohio.

X.

It is further provided in said Act that said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt or other impurities unavoidable in the proper mining or loading of the contents of the several cars of coal in the several operating mines in said State of Ohio, and said Commission is given power to change, after investigation, any percentage ascertained or determined by it from time to time as it shall deem necessary.

XI.

It is further provided in said Act that it shall be the duty of the miner or loader of coal, and his employer, to agree upon and fix for stipulated periods of time the percentage of fine coal allowable in the output of the mine wherein such miner or loader is employed,

and if such agreement is not made, the said Industrial Commission is authorized to fix and determine the same. Said

Commission is also empowered to change from time to time the percentage of fine coal which may be so lawfully loaded. Said Industrial Commission, if it finds that for a period of one month there shall be produced a greater percentage of fine coal than that fixed and determined by it, is authorized to make and enforce such orders relative thereto as will result in reducing the percentage of such fine coal to that fixed by said Commission.

XII.

It is further provided in said Act that it shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of the contents thereof over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid to such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished, and it is provided that any person, firm or corporation who shall violate such provision in respect thereto shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined for each separate offense not less than \$300.00, nor more than \$600.00.

XIII.

It is further provided in said Act that any miner or loader of the contents of the mine car who loads a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by said Industrial Commission shall be guilty of a misdemeanor, and upon conviction shall be punished for the first offense within a period of three days by a fine of fifty cents; for a second offense within such period by a fine of One Dollar; and for a third offense within such period by a fine of not less than Two Dollars, nor more than Four Dollars.

XIV.

Plaintiff further shows to the court on information and belief that on or about the — day of February, 1914, and pursuant to said custom of entering into said biannual contracts, the various operators engaged in the mining of coal in the said States of Ohio, Pennsylvania, Indiana and Illinois, by their representatives, met and conferred with the duly authorized representatives of their employes in the City of Philadelphia, Pennsylvania, with the view to making a wage agreement covering the employment of said operatives in all said four States for the period of two years, beginning with April 1, 1914; that at said meeting said operatives demanded that in the State of Ohio, coal should be mined and produced, and the wages of miners and loaders be determined, in all respects in conformity with said Act of the General Assembly, and in no other manner; that said meeting was adjourned without agreement; that later, on or about the — day of March, 1914, a further meeting was convened in the City of Chicago, Illinois, at which the operatives repeated the same demand with respect to the methods of mining and paying for the coal mined in the State of Ohio, but offered to renew, unmodified so far as weighing and screening of coal was concerned, the contracts expiring on April 1, 1914, in respect to the business of coal mining in the States of Pennsylvania, Illinois and Indiana, but no offer or proposition was made to make any contract with respect to the mining of coal in Ohio, except upon the basis of the said Act of the Ohio Legislature aforesaid.

XV.

Plaintiff further shows to the Court on information and belief that the operators of coal mines in the State of Ohio (among which is the plaintiff herein), were ready and willing to renew, to take effect on April 1, 1914 for the period of two years, the contract which expired on said date, and that the inability to reach such an agreement with their operatives was largely, if not wholly due to the existence of said Act aforesaid prescribing the methods of mining and determining the basis of wages of said miners and employes, and delegating to the said Industrial Commission the powers therein prescribed, and fixing and prescribing the penalties that would be incurred by said operators and said employes for any violations thereof.

XVI.

Plaintiff further shows to the court on information and belief that on April 1, 1914, the owners and operators of mines in the State of Ohio, being unable to secure men to operate their said mines upon the basis and terms upon which said mines had been operating for two years theretofore, were compelled to close down said mines, to their great detriment and damage, and that plaintiff was required for said reasons to close down its mines, to its great loss and damage.

XVII.

Plaintiff further charges that said Act, to-wit: said Senate Bill No. 3, is unconstitutional and void, and of no effect whatsoever, for, among other reasons, the following, to-wit:

(1) It violates the fourteenth amendment to the Federal Constitution, in that it abridges the privileges and immunities of the plaintiff, and deprives it and other persons similarly situated of the liberty of contract, and constitutes an unwarranted and arbitrary interference with plaintiff's right to manage its business of mining, producing and selling coal according to its own judgment, and takes the property of the plaintiff and others similarly situated without due process of law.

(2) Said Act confers authority and power on said Commission and requires it to determine for each operator and each miner and loader in the State, who is paid by the weight, the percentage of impurities unavoidable in proper mining or loading of coal in cars and the allowable percentage of slack or fine coal, thus depriving the said operator and his employes of the right to determine, bargain and contract for the quality of coal to be produced from said mine, all in violation of said Fourteenth Amendment.

11 (3) In conferring power on said Industrial Commission to prescribe the percentage of fine coal that may be loaded and the percentage of slate, sulphur and other impurities that may be loaded with the coal, and prescribing penalties for violations thereof by the miner or loader, said Act constitutes an unwarranted interference with the rights and liberties of said miner and loader, and with his freedom of contract with his employer; and likewise, in requiring the operator to accept and pay for coal of a quality fixed by said Commission, said Act interferes with the freedom of the employer to fix and determine the quality of the product of his mine and interferes with the freedom of the employer and the employé to contract with each other,—all in violation of said Fourteenth Amendment.

(4) The duties devolving on said Commission under said Act, if exercised pursuant to the powers conferred on said Commission by the Act creating said Commission, and especially by Sections 18, 19, 20 21 and 22 thereof, authorize and require said Commission to investigate and inquire into the private business affairs of the operator, all in violation of the rights secured to said operator by the Constitution of the United States, and especially the Fourteenth Amendment thereof.

(5) The plan provided by said Act of fixing the quality of said coal by said Commission, that may be lawfully mined and loaded, is wholly impracticable in the daily business operations of a mine and would result in material and arbitrary interference with the operations of the mine, in violation of said Fourteenth Amendment.

(6) Said Act is not within the police power, or any power of the State of Ohio. It is not designed nor intended to promote nor protect, nor does it bear any relation to the health, safety nor general welfare of the public. It is not intended nor designed to prevent fraud upon the operatives in coal mines. Said operatives by Section 970 of the General Code of Ohio are specially empowered to and in fact do by universal custom, supervise, check and determine the weighing and weight of all coal produced.

(7) The penalties and fines prescribed in Section 6 of said Act, to-wit: Senate Bill No. 3, are so extreme and cumulative as to deter and prevent any person, firm or corporation described in said Act, and subject to its provisions, from challenging the validity thereof, and such persons, firms or corporations are thereby constrained to submit to the provisions of said Act rather than take the chance of the penalties imposed. The minimum fines prescribed in said Section 6 of said Act would amount, in plaintiff's case, to over \$800,000.00 per day for each day's operation of plaintiff's property.

Said Act, for the reasons herein mentioned, denies to this plaintiff and to other persons similarly situated, the equal protection of the law as secured and guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

XVIII.

Said Act is likewise unconstitutional and void in that it violates Section 1 of Article 1 of the Constitution of the State of Ohio, in prohibiting the freedom of contract therein guaranteed and secured.

12

XIX.

Said Act is further in violation of the Constitution of the State of Ohio in that it delegates legislative authority to said Industrial Commission, in violation of Section 1 and Section 26 of Article 2 of said Constitution.

XX.

Said Act is further in violation of Section 16, Article 2, of the Constitution of Ohio, which provides that no law shall embrace more than one subject, which shall be clearly expressed in its title, in that the title to said Act relates exclusively to the weighing of coal at the mine, while said Act purports, in the body thereof, to confer upon said Industrial Commission wide powers of inspection and supervision of the manner and methods of mining coal, and empowers said Commission to determine the quality of coal, which shall be paid for as such, and the contents of mine cars, which shall be binding upon employes and employers, regardless of their contracts in reference thereto.

XXI.

Plaintiff further shows to the court that because of said Act, said Senate Bill No. 3, and the uncertainty in respect to the constitutionality thereof, plaintiff's mines are closed down as aforesaid, and plaintiff is unable to make or accept contracts which are now being offered, and particularly contracts for periods of one year or more, which contracts are now being taken, as plaintiff is advised and believes, by the coal operators in said States of Pennsylvania and Indiana, competitors of the plaintiff, and plaintiff is now, and before the effective date of said Act, suffering great immediate and irreparable injury by reason thereof.

XXII.

13 Plaintiff further shows to the court that said defendants acting as said Industrial Commission, as plaintiff is informed and believes, has taken steps and measures, or is about to take steps and measures, to put said Act in full force and effect, and to that end has employed its agents and a special representative, whose duties are to assist said Commission under said Act, and to make the investigations in respect to the matters and things provided for therein, and plaintiff is advised and believes that said Industrial Commission, through said representative or deputy, and its employés and other agents, is about to demand access to the mines and property of plaintiff, with a view of determining and investigating, and examining into the business of mining as heretofore conducted and carried on by said plaintiff, and plaintiff is advised that said Industrial Commission threatens to and will promptly on May 20, 1914, put into full effect all the provisions of said Act, in the meantime trespassing upon plaintiff's property and *and* the property of other operators of coal mines in Ohio, in the making of said preliminary investigations, as hereinbefore outlined; that said proposed investigations are for the purpose provided in said Act, and constitute an unwarranted and illegal inquiry into the private business affairs of plaintiff.

XXIII.

That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the enforcement of said Act, and from the requirements by said defendants acting as said Industrial Commission in the enforcement thereof, and to prevent a multiplicity of suits against the plaintiff, and to prevent prosecutions under said Act and the imposition of the heavy penalties described therein, and to prevent immediate and irreparable injury which will be caused to plaintiff by reason of the fact that it is prevented from operating its mines and from accepting contracts for the sale of its coal, a writ of injunction is necessary to restrain said defendants from interfering with plaintiff and other persons similarly situated.

XXIV.

That the amount in controversy herein and the value of the matters disputed herein, and the loss which the plaintiff is sustaining by the threatened enforcement of said Act, and the damages to plaintiff, as hereinbefore set forth, will greatly exceed the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

XXV.

Inasmuch, therefore, as plaintiff has no remedy in the premises, save in a court of equity, plaintiff prays the aid of the court.

1. To the end that the said Wallace D. Yapple, Mathew B. Hammond and Thomas J. Duffy, defendants herein, as members of and constituting The Industrial Commission of Ohio, may, without oath (answer on oath being expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged;

2. To the end that said Act, Senate Bill No. 3, may be decreed to be unconstitutional and void, and of no effect whatsoever;

3. To the end that plaintiff may be decreed to have the right to operate its mines and property, and to mine and sell its coal, without compliance in any way with the restrictions in said Act set forth, and with the regulations and orders of said Industrial Commission thereunder;

4. To the end that plaintiff, its agents and employees may be secured against unlawful and illegal trespassing and arrests, fines and penalties, by reason of any alleged violation of said Act;

That the said Wallace D. Yapple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, their agents, deputies, representatives attorneys and employees of every kind whatsoever, may be perpetually and forever restrained by the order and injunction of this court from,

(a) Enforcing and attempting to enforce any of the provisions of said Act, said Senate Bill No. 3;

(b) From entering upon plaintiff's premises for the purpose of making, with respect to said Senate Bill No. 3, any investigation pretended to be authorized by said Act of the Legislature of Ohio creating said Industrial Commission;

(c) Making or establishing any rules or regulations in respect to the amount of fine coal or the amount of impurities to be loaded into cars at plaintiff's mines, or to be taken as a basis for, or considered in connection with, the wages to be paid to and received by said miners and loaders of coal;

(d) Beginning any action of any nature whatsoever against plaintiff, its agents or employees, on account of any violation of said Senate Bill No. 3;

(e) Arresting or causing the arrest of any agent or employee of plaintiff.

And that said defendants, each and all of them, may be in the meantime so restrained during the pendency of this suit, and plaintiff prays for such other relief as it may in equity be entitled to.

XXVI.

May it please your Honors to grant unto the plaintiff not only a writ of injunction conformable to the prayer of this bill to
16 be issued to the above named defendants, but also writ of subpoena to be issued out of and under the seal of this Honorable Court, to be directed to said defendants, Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, commanding them, at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court, then and there to answer the premises, but not under oath (answer under oath being expressly waived), and to abide by the order and decree of the court therein, and that said defendants may appear herein according to law.

RAIL AND RIVER COAL COMPANY,
Plaintiff,

By A. C. DUSTIN, *Its Solicitor.*
HOYT, DUSTIN, KELLEY, McKEEHAN
& ANDREWS, *Att'ys.*

A. C. DUSTIN,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, upon his oath deposes and says that he is the President of Rail & River Coal Company, plaintiff in the foregoing action, and duly authorized in the premises; that he has read the statements and allegations contained in said bill and knows the contents thereof and that the same are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes them to be true.

W. R. WOODFORD.

Sworn to by the said W. R. Woodford, and subscribed by him in my presence this 16th day of April, 1914.

[SEAL.]

ADRIAN WYCHGEL,
Notary Public.

EXHIBIT "A."

(Senate Bill No. 3.)

An Act to Regulate the Weighing of Coal at the Mines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial Commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by its ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such

miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

C. L. SWAIN,

Speaker of the House of Representatives.

W. A. GREENLUND,

President of the Senate.

Concurred February 5, 1914.

Approved February 17, 1914.

JAMES M. COX, *Governor.*

I hereby certify that the foregoing is a true copy of the engrossed bill.

Secretary of State.

Filed in the office of the Secretary of State February 20, 1914.

19 (Subpoena in Equity, Issued April 16, 1914.)

THE UNITED STATES OF AMERICA.

Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, citizens of and resident in the State of Ohio, if they be found in your District, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them, by

Rail and River Coal Company, citizen of and resident in the State of West Virginia.

Hereof they are not to fail under the penalty of the law then ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits, and the Honorable William L. Day, District Judges of the United States, this 16th day of April, A. D. 1914, and in the 138th year of the independence of the United States of America.

[SEAL.]

B. C. MILLER, *Clerk*,
By R. C. DEAN, *Deputy Clerk*.

Memorandum.

The said defendants are required to file their answer or other defense in the Clerk's Office on or before the Twentieth day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

B. C. MILLER, *Clerk*.
D.

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(Endorsement on Subpœna when Issued.)

No. 233. United States District Court, Northern District of Ohio. Rail and River Coal Co. vs. Wallace D. Yaple et al. Subpœna in Equity. Return day May 7, 1914. Hoyt, Dustin, Kelley, McKeehan & Andrews, Complainant's Attorneys.

(Endorsement on Subpœna when Returned.)

April 21, 1914. I hereby accept service for all defendants.

ROBERT M. MORGAN, *Att'y*,
(*Special Counsel for Attorney General
of Ohio*) for all Defendants.

Returned and Filed April 21, 1914. B. C. Miller, Clerk, U. S. District Court, N. D. O.

21 (*Opinion of Court, Filed May 20, 1914.*)

United States District Court, Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. DUFFY, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

On Application for an Interlocutory Injunction.

Decided May 20, 1914.

Before Warrington, Circuit Judge, and Sater and Killits, District Judges.

Per Curiam:

The plaintiff, a West Virginia corporation, a large producer of coal and employer of mine laborers, of whom there are more than 45,000 in Ohio, assails the constitutionality of the Ohio law of February 5, 1914, entitled "An Act to Regulate the Weighing of Coal at the Mines," and asks for an interlocutory injunction against the defendants, who constitute the Industrial Commission of Ohio, to prevent them from enforcing and attempting to enforce any of the provisions of such act. The act, in so far as it need be considered, is set forth in margin.* Diversity of citizenship and the

*SECTION 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such

22 presence of federal questions confer jurisdiction. *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S., 175, 191; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S., 59, 63, 64; *Louisville & Nashville R. R. Co. v. Siler*, 186 Fed. Rep., 176, 179; *Ohio River & W. Ry. Co. v. Bitty*, 203 Fed. Rep., 537, 589; *Mutual Film Co. v. Industrial Commission of Ohio*, decided in this District April 2, 1914.

agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. * * *

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

23 The Ohio Coal Commission, appointed by virtue of a joint resolution of the General Assembly (103 Ohio L., 981) "to investigate and report an equitable method of weighing coal at the mines, when the employees are to be paid for their labor on the basis of weight, measure or quantity, and that will at the same time be to the best interest of the consumers and protect the coal measures of the state," submitted a report in December, 1913, in which, following a review of the evidence and arguments of both operators and miners, it recommended for passage a bill which finally assumed the form of the present act. The information thus brought to the attention of the General Assembly, and to which counsel in the present hearing freely alluded, in so far as deemed material is summarized in the next succeeding paragraph and is as follows:

All mine employ  s are required to belong to the United Mine Workers—the strongest labor organization in the country. They have had no difficulty in the past in securing fair wages. The system of paying miners long in vogue in nearly all Ohio mines originated when only lump coal was marketable and is based on the amount of coal mined and passed over a 1¼ inch screen, which amount is assumed to be 28%. The insistence of the miners that they are paid for but a part of the product of their labor began when the finer grades of coal became salable. Their persistent grievance, although it will not bear analysis, engendered disputes and bitter feeling between them and their employers. A statute (Sec. 956, General Code of Ohio) whose purpose is the avoidance of danger, especially in gaseous mines, wisely requires the removal of fine coal and coal dust from the mines, for the violation of which (Sec. 976, O. C.) the offender may be punished by fine or imprisonment, or both; but the miners, believing their grievance to be just, have not always removed such coal and dust and thereby neither obviate such danger nor conserve the coal supply. Generally stated, from 20% to 50% of the coal under the heretofore prevailing systems of mining has been left in pillars, ribs and stumps. The coal so left deteriorates from exposure, becomes somewhat crushed by the overlying strata, and yields a more than ordinary percentage of fine coal, in consequence of which the miners either wholly refuse to draw such supports or decline to do so unless paid a sum additional to the regular contract price. In many instances, on account of such unwillingness, those portions of mines which yield an unusual amount of fine coal have been abandoned and the fuel so indispensable to industrial progress is lost. On account of dissimilarities in the character of coal, the quantity of fine coal produced varies in different mines and even in different portions of the same mine—the variations in some instances being quite marked. The result is a variation in the wages of miners of equal skill and ability and an advantage to operators obtaining an excess of fine coal as against the miners and also as against other operators in districts in which an effort is made to secure as large a percentage of lump coal as is possible. The increased openings between screen bars, resulting from the wear incident to use, diminish the quantity of lump coal passing over such bars, to the loss of the miner. The failure to sub-

stitute new screens is due in part to the negligence of the checkweighman, authorized by statute (Sec. 970, G. C.) and selected and paid by the miners to call attention to the defective character of the screens, and in part to the carelessness of the operators in failing to maintain screens conforming to their contract. Each, however charges the other with the responsibility of such failure and instances have occurred in which the miners have struck and closed down mines on account of disputes and delays regarding the furnishing of new screens. Neither the charge that the operators so dump mine cars as to break the coal (by an excessive drop from such cars to the screens, for instance), nor the counter charge that the miners will not permit such dumping as will eliminate the fine from the lump coal, is proved; but the cupidity and the carelessness

25 of each are deemed factors worthy of consideration. If coal be shot from the solid, payment on the mine run basis will result in an increased quantity of fine coal. Whether such increase will occur if the coal is undercut before it is shot down, as was done with about 95% of the coal mined at the time the report was filed is, in view of the experience in other states having kindred statutes and the difference in the Ohio coal from that of other fields, problematical. If an increase occurs, it will operate quite prejudicially to the sale of Ohio coal. The adoption of the mine run system will also cause, to the prejudice of the operators, a considerable increase in the amount of impurities brought to the surface, unless some way be found to protect the operator from the carelessness and indifference of the miner, and will require the inauguration of some method of cleaning. It will also necessitate some increased expenditure in the readjustment of tipples. The commission, in view of its findings so summarized as above, concluded that the present system of mining is inequitable, unjust, and productive of discontent. To obviate existing conditions, and to conserve the coal by supplying an incentive to employes to remove pillars, ribs and stumps and the portion of mines yielding more fine coal than is usual and to load and send from the mine the fine coal which is now left underground, the commission recommended that shooting from the solid be prohibited and that the mine run system of payment be adopted, but so safeguarded as to apply to clean coal only, i. e., coal so cleaned as to be marketable.

The plaintiff charges that the act, in lodging in the industrial commission the duty of determining the percentage of impurities unavoidable in the proper mining or loading of coal, and of fixing, in case of disagreement between the mine operator and his employes and until they subsequently agree, the percentage of fine coal allow-

26 able in the output of the mine, unreasonably, unnecessarily and arbitrarily deprives the operator, whose business, it is alleged, is strictly private and unaffected by any public interest, from contracting with his employes for the production of coal containing more impurities or having a greater degree of purity than that which the commission has fixed, and denies him the right to reject and requires him to accept and to make payment for the total contents of each mine car, without deduction or diminution, so

long as the percentage of impurities fixed by the commission is not exceeded. It avers that the act is not designed to protect the morals, health, or safety of the public or of mine employes and has no real or substantial relation as between the purposes attributed to it and the means devised for attaining such purposes, but has for its object the regulation of the relations between masters and such of their servants as are paid by weight for coal mined or loaded; and that it is therefore unconstitutional in that it deprives the plaintiff of liberty and property without due process of law and of the equal protection of the law as guaranteed by the fourteenth amendment and the Ohio bill of rights.

The act must be sustained, unless it can be clearly shown to be in conflict with some constitutional provision. *Board of Health v. Greenville*, 86 Ohio St., 1, 20; *Schmidinger v. Chicago*, 226 U. S., 578, 587, 588; *Mutual Film Co. v. Industrial Commission of Ohio*, *supra*. It came into existence through a claimed exercise of the police power, a power which extends to the making of regulations "promotive of domestic order, morals, health and safety." *Railroad Co. v. Husen*, 95 U. S., 465, 471. Laws enacted in its appropriate exercise have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (*Camfield v. U. S.*, 167 U. S., 518, 524), to promote harmonious relations between capital and labor (*McLean v. U. S.*, 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (*Peel Splint Coal Co. v. West Virginia*, 36 W. Va., 802; *Knoxville Iron Co. v. Harbison*, 183 U. S., 13, 21), to provide for the safety and health of miners (*Freund, Police Power*, Sec. 115; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals and other natural resources. (*Barrett v. Indiana*, 229 U. S., 26, 29; *State v. Ohio Oil Co.*, 150 Ind. 21; *Ohio Oil Co. v. Indiana*, 177 U. S., 190; *Hudson Water Co. v. McCarter*, 209 U. S., 349; *Wilmington Star Mining Co. v. Fulton*, 205 U. S., 60).

The rule announced in *McLean v. Arkansas*, *supra*, which involved a statute akin to that here under consideration, has subsequently been so often approved by the Supreme Court as to be controlling in the present instance, if the Ohio act is not materially different from that of Arkansas and is free from the constitutional infirmities which resulted in the overthrow of the earliest statute for the weighing of coal before screening (93 Ohio L., 33) in *Re Preston*, 63 Ohio St., 428. It is contended that the *McLean* case is not an authority on account (among other things) of the powers conferred on the industrial commission, the alleged absence of a provision granting to operators the right, under proper circumstances, to reject coal brought to the surface, the possibly heavy penalties that may be imposed on offending operators, and the alleged obscurity and uncertainty of the penalties to which transgressing employees will be subjected and that the act must be held to be in excess of the state's police power and contrary to its declared policy in view of the *Preston* case, which pronounced invalid a law less vulnerable, it is claimed, to constitutional objection. None of the state

courts has passed upon the present statute. The courts may declare the public policy when the law-making power is silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law enumerated the subjects of legislative action, such constitutional provision and statutes enacted in harmony therewith must be enforced and not nullified by the courts.

28 Probasco v. Raine, 50 Ohio St., 378, 391. Subsequent to the decision of the Preston case, the state constitution was amended by adding to Article 2 the following sections:

"SECTION 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.

SECTION 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Without determining the soundness of the argument that the act indirectly at least establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety and general welfare of employes. Furthermore, section 36 was designed to limit by appropriate legislation the freedom of contract as regards the methods of mining, weighing and measuring coal. We are not prepared to hold that the legislature, acting within the scope of that section may not say that the business of mining coal is so far affected with a public interest as to justify appropriate regulation of the manner of paying employes when they are to be paid according to the quantity produced and when such regulatory statute will operate to allay discord and strife and conserve the coal supply.

The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month or year, or in any other manner (except as to quantity) that the operator may deem proper.

If the miner or loader by the terms of his employment is to
29 be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car—such contents to include, however, no greater percentage of slate, sulphur, rock, dirt or other impurities than is unavoidable, as determined by the industrial commission. If the employe should send to the surface an excess of such impurities, or of any of them, the operator is not required to accept the car or pay for its contents as delivered but is at liberty to agree with him as to the deductions to be made on account of impurities. If no agreement is made, the offending employe may be prosecuted for his violation of the commissioners' order as for a misdemeanor. If he be unable or unwilling to pay the fine imposed, he may be imprisoned in the county jail until his fine and costs are paid or secured to be paid or he is otherwise legally

discharged, provided that he be given credit upon his fine and costs at the rate of sixty cents per day for each day's imprisonment. Sec. 13,717, G. C. He is thus subjected to penalties which are neither obscure nor uncertain. The act does not require the operator to mingle the contents of such a car with the other coal produced or prevent his removing, by screening or otherwise, the excess of any impurities. It must be presumed that the industrial commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the commissioners' order, which by statute is made *prima facie* reasonable and lawful, he may petition for and obtain a hearing before the commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the state. Act February 27, 1913, 103 Ohio L. 95, Sections 25, 27, 38-42; Art. 4, Sec. 2, Ohio Constitution. The

30 commission may of its own motion upon investigation modify or rescind any of its prior orders. The law permits the employer and employé to stipulate as between themselves what percentage of coal commonly known as nut, pea, dust and slack shall be allowable in the output of the employer's mine. It is only in case of their disagreement that the commission may designate such percentage, and its orders in that behalf must possess the same characteristics as those above mentioned and are likewise subject to rehearing and review. If at any time for a period of one month during the operation of the mine the percentage so fixed is exceeded, the commission is required to enforce its order regardless of whom the offender may be. The act prescribes no penalty for disobedience to such an order, but if, as claimed by defendants, section 43 of the act of February 27, 1913, applies, which we do not determine, an offending party may be fined not less than \$50 nor more than \$1,000 for his first offense, and not less than \$100 nor more than \$5,000 for each subsequent offense. In either event the attitude of the employer is no worse than that of the employé. The danger of an increase in the quantity of fine coal caused by shooting from the solid may, under the act of February 5, 1914 (104 Ohio L., 161), be wholly obviated, if the operator so elects, in that shooting of that character may not be done and is made a misdemeanor, unless the operator and a majority of his miners obtain from the commission, upon application, an order permitting it.

A violation of the provisions of section 6 is made a misdemeanor punishable by fine for each distinct offense in a sum not less than \$300 nor more than \$600. If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature. *Flint v. Stone Tracy Co.*, 220 U. S., 177. If they are not thus separate, they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer wishing to test the law will risk the possibilities of repeated violations of the commissioners' orders.

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Every argument advanced to sustain the contention that

the act delegates legislative power to the industrial commission in violation of Sec. 1, Art. 2, of the state constitution was urged against the act providing a board of censor motion picture films, approved May 13, 1913, in the case brought by the Mutual Film Co. v. The Industrial Commission of Ohio, *supra*. To state our reasons for holding the present contention unsound as we do, would be to repeat in substance what was said to the same point in that case. We are content to abide by the conclusion there reached.

The claim that the act is in violation of section 16 of article 2 of the Ohio constitution which provides that "no bill shall contain more than one subject, which shall be clearly expressed in the title," is unavailing. But one subject is embraced in the act. Were it otherwise, we should follow the decisions of the state court and hold that the provisions of the constitution above quoted is directory and not mandatory. *Ohio ex rel. v. Covington*, 29 Ohio St., 102, 116.

In view of the above quoted amendments to the Ohio constitution, the present act's want of similarity to that considered in the *Preston* case and its general resemblance in its principal features to that of *Arkansas*, the instant case is ruled by *McLean v. Arkansas* and is well within *German Alliance Insurance Co. v. Lewis*, decided April 20, 1914, Sup. Ct. U. S. It is not repugnant to any constitutional provision, state or federal. The prayer for an interlocutory injunction is therefore denied. In order, however, to enable complainant to take an appeal in each of the suits directly to the Supreme Court of the United States, pursuant to Section 266 of the Judicial Code, and to apply to that court for orders of suspension or supersedeas, if it so desire, we have concluded to suspend the operation of the orders of denial herein for a period of fifteen days from the date of their entry.

J. W. WARRINGTON,

Circuit Judge.

J. E. SATER, *District Judge.*

JOHN M. KILLITS,

District Judge.

32 *(Order Overruling Plaintiff's Application for Interlocutory Injunction Entered May 23, 1914, Entered for the Court by Judge Killits, One of the Judges Sitting Therein.)*

No. 233. Equity.

RAIL & RIVER COAL COMPANY

VS.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

This cause having hitherto been argued before the court and submitted, and an opinion having been filed herein, signed by the judges of said court, which was constituted pursuant to Section 266, Judicial Code, in accordance with such opinion, it is ordered, adjudged and

decreed that the motion of the plaintiff for an interlocutory injunction suspending and restraining the enforcement,, operation and execution of the Act of the legislature of Ohio, entitled "An act to regulate the weighing of coal at the mines," approved February 17, 1914, be, and the same is hereby denied; to all of which the plaintiff excepts.

It is ordered that the operation of this order denying said application for an interlocutory injunction be, and the same hereby is, suspended for a period of fifteen days from this date, to enable the plaintiff to take an appeal to the Supreme Court of the United States, if it should so desire.

33 *(Preliminary Restraining Order, Entered May 23, 1914, by Honorable John W. Warrington, U. S. Circuit Judge; Honorable J. E. Sater, U. S. District Judge, and Honorable John M. Killits, U. S. District Judge.)*

No. 233. Equity.

RAIL AND RIVER COAL COMPANY

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio.

This cause having been argued before and submitted to the court, consisting of Honorable John W. Warrington, Circuit Judge, Honorable John E. Sater, District Judge, and Honorable John M. Killits, District Judge,—such court having been constituted pursuant to Section 266 of the Judicial Code,—upon motion for an interlocutory injunction as prayed in the Bill; and such motion, after due consideration by such court, having been denied as appears by its per curiam opinion and order heretofore filed and entered in the cause; and such court having inadvertently and erroneously assumed that preliminary restraining order had been previously granted pursuant to Section 266 of the Judicial Code, and so provided for suspension of its order of denial herein for a period of fifteen days to enable complainant to take an appeal to the Supreme Court of the United States if it should so desire; now it is hereby ordered that a temporary restraining order be, and such order hereby is, granted as prayed in the bill of complaint herein until the 4th day of June, 1914 (on which day said order shall expire), for the purpose of enabling complainant, if it shall so desire, to appeal the cause to the Supreme Court of the United States and there apply for an order of suspension or supersedeas in the cause.

34 *(Petition for Appeal. Filed May 28th, 1914.)*

In the District Court of the United States for the Northern District
of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J.
Duffy, as Members of and Constituting the Industrial Commission
of Ohio, Defendants.

Petition for Appeal.

The above named plaintiff, feeling itself aggrieved by the order made and entered in this cause on the 23rd day of May, A. D. 1914, does hereby appeal from said order to the Supreme Court of the United States, in accordance with the provisions of Section 266 of the Judicial Code, for the reasons specified in the assignment of errors which is filed herewith, and it prays that said appeal be allowed, and that a transcript of the record, proceedings and papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays that the proper order, touching the security to be required of it to perfect its appeal, be made.

HOYT, DUSTIN, KELLEY, McKEEHAN
& ANDREWS,

Attorneys for Plaintiff.

A. C. DUSTIN,
Of Counsel.

The foregoing petition is hereby granted and the appeal allowed upon giving bond, conditioned as required by law in the sum of \$250.00.

JOHN M. KILLITS, *Judge.*

The issuance and service of a citation herein is hereby waived, this
28th day of May, 1914.

35

TIMOTHY L. HOGAN,
Attorney General of Ohio,
Attorney for Defendants.

CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel.

(Assignment of Errors. Filed May 28, 1914.)

In the District Court of the United States, Northern District of Ohio,
Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendants.

Assignment of Errors.

And now comes the plaintiff, Rail and River Coal Company, and says that the order entered in the above cause on the 23rd day of May, A. D. 1914, is erroneous and unjust to the plaintiff because the court, composed of Judges Warrington, Killits and Sater, which in accordance with the provisions of Section 266 of the Judicial Code, heard the plaintiff's application for an interlocutory injunction herein, erred for the following reasons:

1. The District Court erred in denying the application of
36 the plaintiff made after due notice and hearing for an interlocutory injunction.

2. The District Court erred in holding that the act of the General Assembly of the State of Ohio, entitled "An act to regulate the weighing of coal at the mines," passed by the General Assembly on February 5, 1914, approved by the Governor of the State of Ohio on February 17, 1914, and filed in the Office of the Secretary of State on February 20, 1914, does not violate Section 1, of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from denying any person of liberty or property without due process of law.

3. The District Court erred in refusing to hold that the said act constitutes an unwarranted and arbitrary interference with the right of the plaintiff and of others similarly situated to contract with their employees, and to manage their business of mining, producing and selling coal, according to their own judgment; and in refusing to hold that the said act thereby deprives the plaintiff, and others similarly situated, of liberty and property without due process of law, in violation of the said Fourteenth Amendment.

4. The District Court erred in refusing to hold that the said act in conferring authority and power on the Industrial Commission of Ohio, and in requiring it to determine for each operator and each miner and loader in the state, who is paid by weight, the percentage of impurities unavoidable in the proper mining or loading of coal in cars, and the allowable percentage of slack and fine coal, thereby deprives the said operator and its employees of the right to determine, bargain and contract for the quality of coal to be produced

from said mines, and thereby deprives the plaintiff and others similarly situated of liberty and property without due process of law, in violation of the said Fourteenth Amendment.

5. The District Court erred in refusing to hold that the said act in requiring the operator to accept and pay for the mining of coal of a quantity fixed by the Industrial Commission of Ohio, interferes with the freedom of the employer to fix and determine the product of his mine, and interferes with the freedom and the right of the employer and the employee to contract with each other, and thereby deprives the plaintiff and others similarly situated of liberty and property without due process of law, in violation of the said Fourteenth Amendment.

6. The District Court erred in failing to hold that the said act denies to the plaintiff and others similarly situated the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and by Article 1 of the Constitution of the State of Ohio.

7. The District Court erred in holding that the General Assembly of the State of Ohio had authority to pass the said act under the police power of the said state.

8. The District Court erred in failing to hold that Sections 34 and 36 of Article 2 of the Constitution of the State of Ohio did not authorize the General Assembly to pass said act.

9. The District Court erred in that it failed and refused to follow the decisions of the Supreme Court of the State of Ohio, with respect to the extent and exercise of the police power of the said State, and the interpretation and construction of the Constitution of the said State.

10. The District Court erred in holding that the said act does not delegate legislative power to the State Industrial Commission in violation of Sections 1 and 26 of Article 2 of the Constitution of the State of Ohio.

11. The District Court erred in holding that the said act does not violate Section 1, or any other section, of Article 1 of the Constitution of the State of Ohio.

12. The District Court erred in holding that the said act with respect to the penalties therein prescribed for violation thereof, does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 16 of Article 1 of the Constitution of the State of Ohio.

13. The District Court erred in failing to find that the plaintiff, pending the final hearing in said court, would suffer irreparable injury and damage, if the enforcement of said act were not enjoined.

HOYT, DUSTIN, KELLEY, McKEEHAN &
ANDREWS,

Attorneys for Plaintiff, Cleveland, Ohio.

(Bond on Appeal. Filed May 28, 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. DUFFY, as Members of and Constituting the Industrial Commission of Ohio, Defendant.

Bond on Appeal.

39 Know all men by these presents that we, Rail and River Coal Company, a corporation of West Virginia, as principal and the American Surety Company of New York, a corporation of New York as surety, acknowledge ourselves to be jointly indebted to Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as Members of and Constituting The Industrial Commission of Ohio, appellees in the above cause, in the sum of \$250.00 conditioned that—

Whereas, on the 23rd day of May, A. D. 1914, in the District Court of the United States, for the Northern District of Ohio, Eastern Division, in suit pending in that court, wherein the Rail and River Coal Company was plaintiff, and the appellees above named were defendants, appearing on the Equity Docket as No. 233, an order or decree was rendered against said Rail and River — Company, and said Rail and River Coal Company having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the Office of the Clerk of this Court, to reverse the said order or decree, and issue of a citation thereon having been duly waived by the defendants.

Now, if the said Rail and River Coal Company should prosecute its appeal to the effect and answer all costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and effect.

RAIL AND RIVER COAL COMPANY,
By W. R. WOODFORD, *President*,
AMERICAN SURETY COMPANY OF
NEW YORK.

By C. I. ZIMMERMAN, *Res. Vice-Pres.*

[SEAL.]

Attest:

H. LABET,

Res. Ass't Sec'y.

The Foregoing Bond on appeal is hereby approved.

JOHN M. KILLITS,
*Judge of the U. S. District Court, Northern
District of Ohio, Eastern Division.*

40a (*Order Allowing Appeal*, Entered May 28th, 1914, by Judge Killits.)

No. 233. Equity.

RAIL AND RIVER COAL COMPANY

vs.

WALLACE D. YAPLE et al.

On motion of A. C. Dustin, Esq., solicitor and of Counsel for the complainant, it is ordered that an appeal to the Supreme Court of the United States, from the decree heretofore filed and entered herein on the 23rd day of May, 1914, be and the same is hereby allowed; and that a certified transcript of the record in accordance with the rules of practice of the Courts of Equity of the United States, November 4th, 1912, be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed in the sum of Two Hundred and Fifty Dollars (\$250.00).

40 (*Precipe. Filed May 28, 1914.*)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, Plaintiff,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. Duffy, as Members of and Constituting the Industrial Commission of Ohio, Defendant.

Precipe.

To the Clerk:

Please prepare transcript for appealing to the Supreme Court of the United States, under Section 266 of the Judicial Code, from the order made in the above entitled cause on May 23, 1914, by this court, denying the plaintiff's application for an interlocutory injunction, including in said transcript a copy of each of the following pleadings and documents.

1. Bill of Complaint.
2. Subpoena in equity bearing acceptance of service on behalf of defendants thereon.
3. Memorandum of opinion filed by Judges Warrington, Killits, and Sater on May 20, 1914.
4. Order overruling plaintiff's application for interlocutory injunction entered May 23, 1914.

5. Temporary restraining order granted May 23, 1914.
6. Petition for appeal and allowance.
7. Assignment of errors.
8. Appeal bond.
9. Precipe.

HOYT, DUSTIN, KELLEY, McKEEHAN &
ANDREWS,

Attorneys for Plaintiff.

41. (Certificate of Clerk.)

In the District Court of the United States, Northern District of Ohio,
Eastern Division.

No. 233. Equity.

RAIL & RIVER COAL COMPANY

vs.

WALLACE D. YAPLE et al.

NORTHERN DISTRICT OF OHIO, ss:

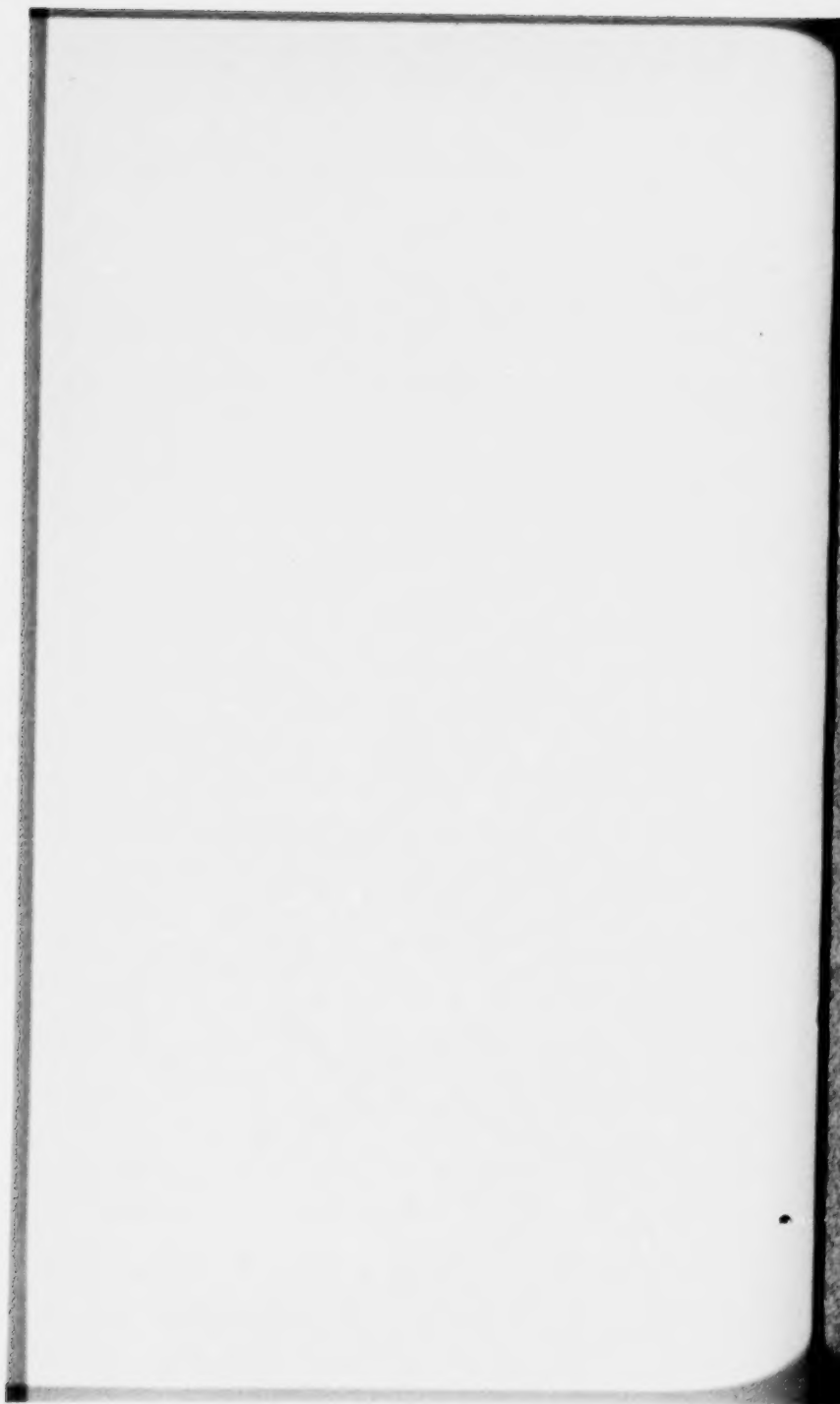
I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that the foregoing pages contain a full, true and complete copy of the record in the above entitled cause, in accordance with the precipe for transcript filed by the Appellant, Rail and River Coal Company, including the petition for appeal, assignments of error and the memorandum opinion of the Court.

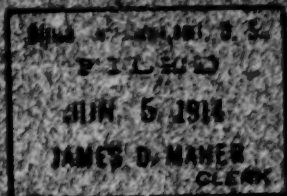
In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, Ohio, this 29th day of May, A. D. 1914, and in the 138th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*
By R. C. DEAN,
Deputy Clerk.

Endorsed on cover: File No. 24,255. N. Ohio D. C. U. S. Term No. 1104. Rail and River Coal Company, appellant, vs. Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio. Filed June 4th, 1914. File No. 24,255.





IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~11045~~.13

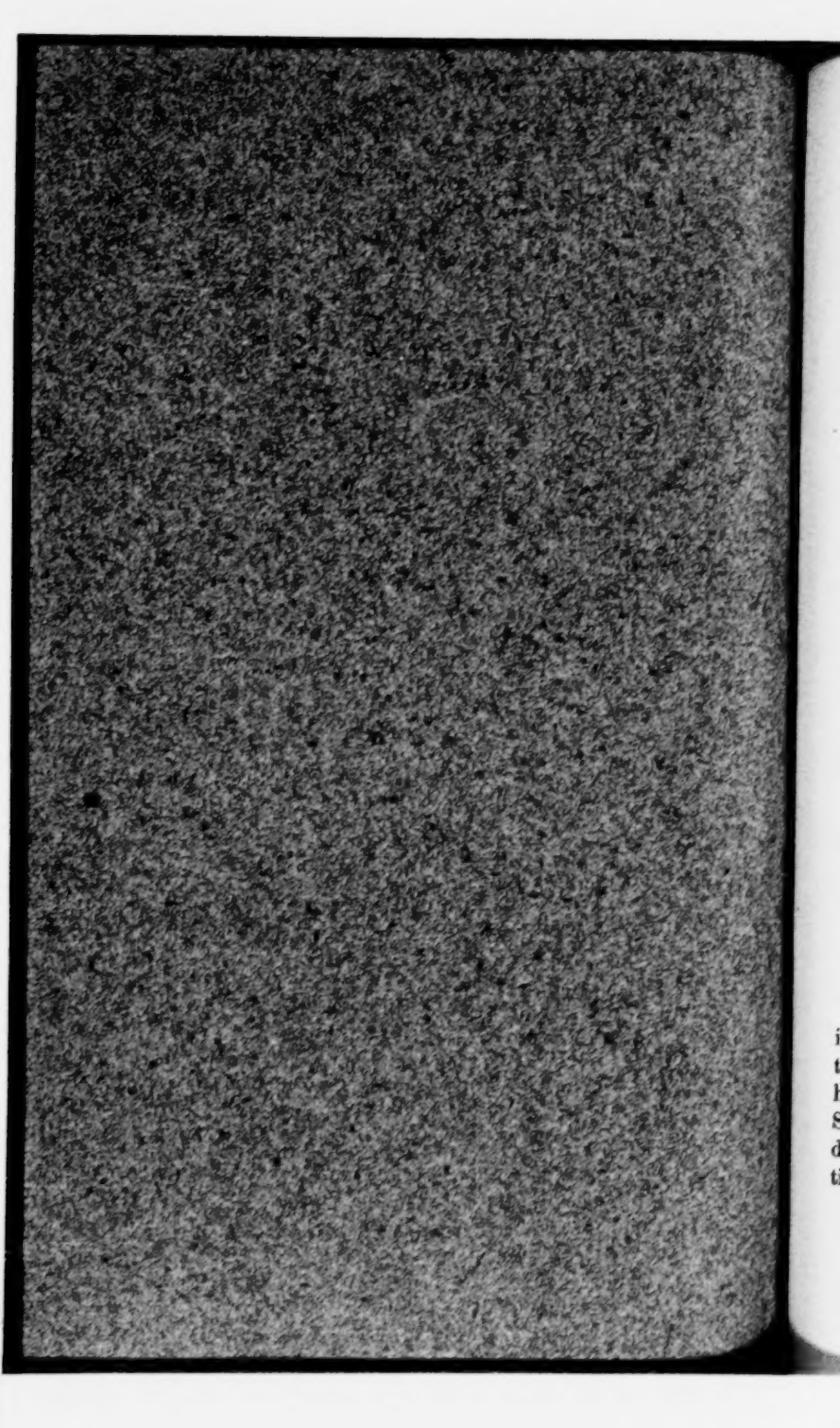
**RAIL AND RIVER COAL COMPANY, PLAINTIFF-
APPELLANT,**

vs.

**WALLACE D. YAPLE, MATHEW B. HAMMOND, AND
THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUT-
ING THE INDUSTRIAL COMMISSION OF OHIO, DEFENDANTS-
APPELLEES.**

**RECORD BY STIPULATION ON MOTION FOR
TEMPORARY RESTRAINING ORDER.**

A. O. DUSTIN,
Attorney for Appellants.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1913.

No.

RAIL AND RIVER COAL COMPANY, PLAINTIFF-
APPELLANT,

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND
THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUT-
ING THE INDUSTRIAL COMMISSION OF OHIO, DEFENDANTS-
APPELLEES.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Now comes Rail and River Coal Company, appellant, by
attorneys, representing to the court that it has appealed
the Supreme Court of the United States from an order
retrofore entered herein by the District Court of the United
States for the Northern District of Ohio, Eastern Division,
 denying appellant's application for an interlocutory injunc-
 tion, which appeal has been allowed by said district court, re-

spectfully moves the court to grant a temporary restraining order herein, pending the hearing and decision of such appeal by this court.

RAIL AND RIVER COAL COMPANY,
By HOYT, DUSTIN, KELLEY, Mc-
KEEHAN & ANDREWS,
Its Attorneys.

(NOTICE.—Acknowledgment omitted.)

Copy.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL AND RIVER COAL COMPANY, *Plaintiff*,
vs.
WALLACE D. YAPLE ET AL., *Defendants.*

Affidavit in Support of Application for Restraining Order.

THE STATE OF OHIO,
Cuyahoga County, ss:

Charles E. Maurer, being first duly sworn, deposes and says that he is forty-nine years of age; that he is president of the Glens Run Coal Company and the St. Clair Coal Company, which operate in the State of Ohio, and is also president of the Standard Pocahontas Coal Company, which operates in West Virginia; that said companies produce approximately nine hundred thousand tons of coal per year; and that affiant has been familiar with the coal business in Ohio, Pennsylvania, West Virginia, and Indiana for the period of fifteen years last past.

Affiant further says that he has read the bill filed in this case; that there is invested in the coal mining industry in the

State of Ohio fully one hundred million dollars; that such business gives employment directly to upwards of 45,000 persons to whom wages were paid in the year 1913 in excess of twenty-eight million dollars, and indirectly gives employment to many thousands of other persons; that there was produced from the mines in Ohio during said year upwards of thirty-six million tons of bituminous coal.

Affiant further says that all the coal in Ohio and Indiana was produced by employees who are members of an organization known as the United Mine Workers of America, and that of the eighty-two million tons of bituminous coal produced in 1913 in the western part of the State of Pennsylvania approximately forty million tons were produced by members of said organization, and that of the coal mined in West Virginia approximately ten million tons were produced by mines employing union labor.

Affiant further says that for upwards of twenty years to affiant's knowledge, and to affiant's best belief from practically the beginning of the business of coal mining in the State of Ohio, the coal mines in Ohio have been operated on what is known as the screen-coal basis.

Affiant further says that for many years it has been the practice at stated intervals, either once a year or once every two years, for the coal operators who employ union miners to meet in convention with officers and representatives of said miners' union and fix a scale of wages to be paid at mines employing union labor for certain definite periods; and that the contract entered into a little over two years ago was for a period of two years, expiring on April 1, 1914. Said contract, as well as several of the contracts theretofore made, provided for the payment of miners and loaders of coal upon the screen-coal basis in the State of Ohio, and, generally speaking, in Pennsylvania and Indiana. Where miners and loaders are being paid on the screen-coal basis the weight of the coal is ascertained by passing the same over a screen, the bars of which are, as applied to Ohio, Pennsylvania, and Indiana, one and one-fourth inches apart.

Affiant further says that the bituminous coal produced in Pennsylvania, Ohio, and Indiana, is sold under keenly competitive conditions, and that such coal and coal produced in West Virginia reaches approximately the same markets; that in the year 1913 twenty-three million tons of bituminous coal produced in Ohio, Western Pennsylvania, and West Virginia, were shipped via vessel up the Great Lakes, all of which were sold on the same market and under competitive conditions.

Affiant further says that the margin of profit in the coal business for many years has been very small; that according to statistics prepared by Dr. E. W. Parker, of the United States Geological Survey, the profits in coal mining in the year 1909 were 2.5 per cent of the capital actually invested, or, as stated by Dr. Parker—

“The average value per ton of all the bituminous coal produced in the United States (1909) was \$1.07, the costs averaged a fraction of a cent over \$1.00, so that the margin of profit to cover interest, depreciation, and amortization was a little less than 7 cents a ton. * * *

“Pennsylvania, by long odds the most important producer, with an output of 137,300,000 tons, showed a total of expenses of \$117,440,000 and of value of \$129,550,000, a balance on the profit side of a little over \$12,000,000, or about 3½ per cent on the capital invested. * * *

“The four competitive States, West Virginia, Illinois, Ohio, and Indiana, which rank second, third, fourth, and fifth, respectively, in producing importance, all show such narrow margins between income and outlay that profits are visible only with a microscope. The figures follow:

	Value of product.	Expenses.	Difference.
West Virginia..	\$44,344,067	\$43,024,716	\$1,319,351
Illinois	53,030,545	51,697,504	1,333,041
Ohio	27,353,663	27,153,497	200,166
Indiana	15,018,123	14,906,831	111,292”

and since said date there has been little or no change in the situation.

Affiant further says that in mining coal the efforts of the operator are directed to produce as large a per cent of lump coal as possible; that there is of necessity in the production of coal some slack coal produced, which is generally marketed under cost; that slack coal sells on an average of 45 cents per ton less than coal screened over a $1\frac{1}{4}$ -inch screen, 35 cents per ton less than coal screened over a $\frac{3}{4}$ -inch screen, and 25 cents per ton less than the ordinary run-of-mine coal as produced without a screen.

Affiant further says that the experience of operators in States where methods of mining have been changed from a screen-coal basis to run-of-mine basis shows that the amount of slack coal produced has very materially increased,—in some cases the amount of slack coal has practically doubled, so that the market value of the product is very materially reduced by such change in the methods of mining.

Affiant further says that just prior to the expiration of the last agreement with the United Mine Workers various meetings were held by the operators and the representatives of said union in an effort to reach an agreement relative to the mining of coal for two years following April 1, 1914; that after many negotiations an agreement was entered into between said union and the operators in respect to mining coal in Western Pennsylvania, Indiana, and Illinois, but no agreement was made with respect to mining coal in Ohio, and the mines in the State of Ohio are and have been closed since April 1st; that the wage agreement so entered into was substantially a renewal for a period of two years of the old agreement expiring on April 1, 1914, in said States.

Affiant further says that the operators of Ohio were ready and willing to continue their old agreement for the further period of two years, and such an agreement would have been entered into but for the statutes of the State of Ohio changing the method of mining and weighing coal referred to in the bill in this case.

Affiant further says that while theoretically it may be possible to mine coal at so much per day, or so much per week, it is the universal practice wherever the United Mine Workers are employed to exact payment by weight for all miners and loaders of coal, and the members of such union refuse to work in any other way.

Affiant further says that as a matter of fact payment by the day or week is not practicable in a business such as coal mining, where the working places are widely separated and incapable of proper supervision.

Affiant further says that the markets for Ohio coal require the production of large amounts of lump coal, and that the cost of changing the tipples and loading devices in use in the mines of the State of Ohio, so as to weigh the coal before the same is screened, would entail a large expense upon the plaintiff to readjust its tipples and mining devices, and would entail an expense to the operators of Ohio for that purpose of upwards of one million dollars.

Affiant further says that while theoretically it may be possible to change the methods of weighing coal from the screen-coal basis to a run-of-mine basis, and change the method of paying employees from one basis to the other, as a practical proposition such changes cannot be made without great loss and injury; that the present law in Ohio was enacted by the legislature of said State upon the demand of the United Mine Workers, and that if adopted by the operators in Ohio as a method of weighing coal and paying employees it will be impossible to restore the former method of weighing and paying for coal except after strikes, lockouts, and labor troubles involving great loss and expense to both the operators and their employees, which is to be deprecated, and which should be avoided until the ultimate constitutionality of this law is determined.

Affiant further says that the contracts heretofore made prior to April 1, 1914, between said United Mine Workers and operators in the States of Pennsylvania, Ohio, and In-

diana, were in each case the result of long and protracted efforts to adjust the varying conditions to a proper competitive basis, and that any attempt to establish a proper competitive run-of-mine basis for the mines in Ohio when coal is being produced and paid for in Western Pennsylvania and Indiana on a screen-coal basis is a matter of the greatest difficulty. All attempts that have been made to that end since the passage of the law complained of in this bill have failed, and as the result of such failure all the mines in Ohio are now closed down, as aforesaid, and all said employees are idle.

Affiant further says that the law of Ohio places upon the coal operators of Ohio a great disadvantage, in that the Industrial Commission of Ohio is authorized to fix and make public the per cent of slate, rock, dirt, and other impurities which may be loaded with the coal, and that such determinations, being matters of public notoriety, will be used against the coal operators of Ohio in all markets where the coal of Ohio comes into competition with the coal produced in other States, which will force the Ohio coal to be sold at a very much less price than if mined in the ordinary way and under rules and regulations prescribed by the operators themselves.

Affiant further says that in many of the coal mines in Ohio the coal seam contains one or more dirt or slate bands, and that it is only by the most constant and unremitting vigilance on the part of the operators that coal can be produced in a marketable condition, and that the fixing by the Industrial Commission of Ohio of certain percentages of dirt and other impurities which may be properly mined with the coal, and the taking from the operator the right to determine how his coal shall be mined, will necessarily lead to great carelessness and indifference on the part of the miners, and that the method of control prescribed by said law is wholly impractical and will not protect the operator against a product being produced from his property which he cannot

market in competition with coal produced in the other States mentioned.

Affiant further says that coal has been produced and paid for in Ohio for more than thirty years upon the lump-coal basis, and that no injury can result to the miners in the State of Ohio, or to the State of Ohio itself, by continuing such condition until a full hearing can be had and the validity of the legislation attacked in this bill finally determined.

Affiant further says that experience has shown that when miners and loaders are paid on the screen-coal basis they will exercise great care in the method and manner of shooting coal, but that when they are paid on the mine-run basis there is no such incentive to mine good coal, the consequence being that much larger charges of powder are used and less care exercised, and that as a result thereof the dangers of mining have been very much increased.

Further deponent saith not.

CHAS. E. MAURER.

Sworn to before me and subscribed in my presence, this 29th day of May, 1914.

[SEAL.]

P. L. KLEIN,
Notary Public.

Copy.

(Caption omitted.)

THE STATE OF OHIO,
Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, deposes and says that he is president of the Rail & River Coal Company, plaintiff herein; that he has read the affidavit of Charles E. Maurer, and that the facts therein as stated are true.

Affiant further says that to rebuild and rearrange the tipples at plaintiff's mines so as to handle the coal there-

from in a practicable manner and comply with the law of Ohio would cost the plaintiff not less than ten thousand dollars, and a similar amount to change back in event said law of Ohio is ultimately held unconstitutional.

Further deponent saith not.

W. R. WOODFORD.

Sworn to before me and subscribed in my presence this 29th day of May, 1914.

[SEAL.]

P. E. KLEIN,
Notary Public.

STATE OF OHIO,

Cuyahoga County, ss:

D. J. Jordan, being first duly sworn, deposes and says that he is forty-three years of age and is a resident of Cleveland, Ohio, and has been engaged in the coal business practically all his lifetime; that after the appointment of the Ohio Coal Mining Commission by the Governor of Ohio, under the joint resolution referred to in this case to investigate and report an equitable method of weighing coal, etc., affiant was employed by the coal operators of Ohio to go with said commission, and accompanying said commission and affiant was one Percy Tetlow, who, at that time, was a member of the Ohio Legislature; that after the testimony was taken and the matter was being considered by the commission affiant and said Tetlow both made arguments before said commission as to the proper report for them to make to the Ohio Legislature; that in the argument made by said Tetlow he, in affiant's hearing, said in substance:

If this commission will recommend a mine-run law for Ohio we guarantee you that there will never be another screen-coal contract entered into by the miners in the competitive fields, meaning thereby that if the commission would recommend to the legislature and the legislature should adopt a screen-coal law for Ohio that Ohio would not

be allowed by the United Mine Workers to be put at a disadvantage in competition with the competitive States.

At the time said Tetlow was engaged in said work, and at the time he made said statements, he was not only a member of the legislature, but was an official of the United Mine Workers.

Further affiant saith not.

D. J. JORDAN.

Sworn to and subscribed in my presence by said D. J. Jordan the 1st day of June, 1914.

P. E. KLEIN. [SEAL.]
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL & RIVER COAL COMPANY, *Plaintiff,*

vs.

WALLACE D. YAPLE ET AL., *Defendants.*

Affidavit in Opposition to Application for Restraining Order.

THE STATE OF OHIO,
Franklin County, ss:

John M. Roan, being first duly sworn, deposes and says that he is the duly appointed, qualified, and acting chief deputy and safety commissioner of the Division of Mines of the Industrial Commission of Ohio; that he is 55 years of age; that at the age of nine and one-half years he commenced to work in and about a coal mine; that he has served in practically every employment or position in and about coal mines in the State of Ohio from that time until he became a coal operator and superintendent as hereinafter stated, such positions being those of trapper, track layer, practical miner, engine runner, and, in fact, all related positions; that he

was a practical miner in Ohio coal mines for a period of approximately sixteen years; that in addition to serving in the aforementioned employments and positions he has been an operator of coal mines in the States of Ohio and West Virginia, holding the following managerial positions:

Between the years 1884 and 1901 affiant, together with others associated with him, owned and operated a mine in Perry County, Ohio, known as the Martin and Roan mine; at the date last mentioned affiant and his associates sold said mine to The Sunday Creek Coal Company, a large corporation operating more than sixty mines located in the States of Ohio and West Virginia.

In the year 1900 affiant was employed by the said The Sunday Creek Coal Company as general superintendent of its properties in the Hocking and Sunday Creek fields in the State of Ohio, located in Hocking, Perry, and Athens counties in said State; that in such capacity affiant was in charge of 34 mines owned and operated by said The Sunday Creek Coal Company; in 1901 the said The Sunday Creek Coal Company purchased a number of mines in the State of West Virginia and at the same time purchased the Martin and Roan mine, of which affiant was part owner as aforesaid; at that time affiant was employed by The Sunday Creek Coal Company as manager of its practical operations, both in Ohio and West Virginia, and as such gave all his time to The Sunday Creek Coal Company and had charge of all of its mining operations of whatsoever character and wherever located; in the year 1907 affiant was employed by the Clinchfield Coal Corporation in a capacity which required him to develop mining properties located in the State of Virginia upon 316,000 acres of coal land located in said State; that he remained in the employ of said Clinchfield Coal Corporation for a period of four years, during which he opened up on the property of said corporation ten bituminous coal mines.

In the year 1911 affiant resigned the position last described

and organized a corporation under the name of the Log Mountain Coal Company, which said company acquired the ownership of five bituminous coal mines located in Belle County, Ky.; the said company operated and is still operating all of said mines, and affiant at that time became general manager of said company; affiant continued in the position last described for a period of about one year, when he was forced to abandon the same because of failing health. Affiant returned to Ohio for the purpose of regaining his health, and in the year 1913 was appointed by the Hon. James M. Cox, governor of said State, as a member of the Ohio Coal Mining Commission, being a commission appointed under authority of an act of the General Assembly of the State of Ohio for the purpose of investigating and reporting upon the conditions of coal mining in the State of Ohio and the method of compensating the miners for their services. A copy of the report of said commission is attached hereto and made a part hereof, marked "Exhibit A."

Since December 26, 1913, affiant has been connected with the Industrial Commission of Ohio and is now serving in the capacity first above stated.

Affiant said that he has read the affidavit of Charles E. Maurer filed in support of the application for a restraining order in the case of the Rail & River Coal Company *vs.* Wallace D. Yapple *et al.*

Affiant says that the statement on page 2 of said affidavit to the effect that "from practically the beginning of coal mining in the State of Ohio the coal mines in Ohio have been operated on what is known as the screen-coal basis" is not strictly correct; that as a matter of fact and to affiant's personal knowledge there was no single and uniform basis of compensating coal miners and loaders in use in the State of Ohio prior to the year 1883, but that prior to said date the several coal mines then operated in the State of Ohio made use of different bases, such as the car measure, the bank measure, the run of the mine, weight measure, and the

screen basis, with the use of screens of various lengths and differing meshes; in the year 1883, under an act of the Legislature of the State of Ohio, a commission was appointed to investigate the subject of the compensation of miners. The said commission and its report are referred to at page 33 of the attached report of the Ohio Coal Mining Commission. The said commission of 1883 recommended in its report the use of the screen system and the prescribing of a standard screen. Since that time the recommendations of said commission have been, by agreement, followed throughout the State of Ohio, with very few exceptions, and the statement of Mr. Maurer would hold good from the date mentioned to the present time. Affiant says, however, that the present-day conditions in the bituminous coal-mining industry in the State of Ohio are fundamentally different from those which existed when the commission of 1883 made its report, and when what is known as the screen-coal basis of compensation was adopted uniformly in the State, in this to wit:

In 1883, and for some years thereafter, there was no market for Ohio bituminous coal which would pass through a three-eighths-inch screen. In the opinion of the commission of 1883 this fact constituted a sufficient reason for the adoption of the screen-coal basis of compensation and the rejection of what is known as the mine-run basis of such compensation. At the present time and for several years last past there has been a market for all coal of standard purity which can be brought out of an Ohio coal mine, and coal which goes through the screen is now sold as well as that which passes over the screen; therefore the condition which led to the adoption of the screen-coal basis no longer exists; while the condition, the absence of which precluded the adoption of the mine-run system in 1883, has now arisen, viz., the marketability of all coal regardless of its ability to pass over the screen.

Affiant further says that the statement of Mr. Maurer

at page 2 of his affidavit relative to the nature of the contracts made between the coal operators and the miners' union is somewhat misleading; that as a matter of fact the territory of the State of Ohio and the extreme western portion of the State of Pennsylvania constitutes the only part of the entire bituminous coal fields of the United States in which a strict and exclusive screen-coal basis has been agreed upon as a method of compensation. In the State of Indiana, referred to by Mr. Maurer, the agreement between the operators and the miners' union provides for a double standard, both screen and mine run and both standards are in actual use in that State. The same, or the exclusive use of the mine-run system, is true of all other bituminous coal fields wherein the miners are organized and affiliated with the United Mine Workers of America, including all fields which are in direct competition with the Ohio fields.

Affiant further says that Mr. Maurer's further statement on page 2 of his affidavit relative to the competition of Ohio bituminous coal with that produced in Pennsylvania, Indiana and West Virginia is somewhat misleading. Affiant says that it is true that Ohio, and particularly Eastern Ohio, in which the operations of the companies with which Mr. Maurer is connected are conducted, is in competition with Pennsylvania, Indiana and West Virginia; also with Illinois, which Mr. Maurer does not mention (and in which field the mine-run basis of compensation is exclusively used); affiant says that to his personal knowledge the different operators in the Eastern Ohio field are in competition primarily with each other rather than with the operators in outlying fields or States; that coal from this district does not compete with coal from other States until it reaches Cleveland. At this point Ohio coal is offered for sale at 15 cents a ton less than Pennsylvania coal, and on the Great Lakes, including the upper lake ports, as affiant is informed and believes, Eastern Ohio coal is offered at 15 cents a ton lower than Pennsylvania coal and at 5 cents a ton lower than coal

produced in the Hocking Valley field, which is in the State of Ohio. Affiant has no knowledge of any West Virginia coal known as splint coal, being offered in any market at a price lower than 5 cents a ton less than Hocking Valley coal, which would be the same price as Eastern Ohio coal.

With respect to the statement of Mr. Maurer in his affidavit at page 3 to the effect that slack coal is "generally marketed under cost," this affiant says that from his knowledge of the coal-mining business, the truth of this statement cannot be established or overthrown by any absolute proof, because all depends upon the method of book-keeping and calculating cost of production; however, to the best of his knowledge the cost of production is and only can be figured on the basis of the total product, that is, on a mine-run basis, because it is impossible separately to compute and ascertain, except by some arbitrary method, the respective cost of production of lump coal, slack coal, and the various intermediate grades. When coal is separated into the various grades and sold otherwise than as run of mine, *i. e.*, as lump, nut, pea, slack, etc., the question as to whether or not each grade is sold at a "profit" can be figured only on what might be termed the average cost of production, *i. e.*, the cost of producing the whole product on the mine-run basis. As a matter of course, the higher-priced grades will appear on such a basis of computation to be sold at a higher profit, while the slack will appear, on such a basis, to be sold below cost of production; but the average of the coal sold at various grades and otherwise than on the mine-run basis will always be, affiant believes, in excess of the actual cost of production.

Respecting Mr. Maurer's statement on pages 3 and 4 of his affidavit, to the effect or carrying the inference that under a run-of-mine basis the amount of slack coal produced will be practically doubled, based upon the experience of other States, this affiant says that to the best of his knowledge and belief there is no basis whatever for any such

statement. It is true that the relative amount of fine coal will undoubtedly be slightly increased on the run-of-mine basis, but this increase, in affiant's opinion, would come from the fine coal that is now being left in the mine and thrown back into the refuse pile. Affiant states positively, as a result of his personal experience and the investigations made by him as a member of the Ohio Coal Mining Commission, that the leaving of fine coal in the mine is a great economic waste of fuel and, furthermore, adds to the danger of operating the mine.

Affiant further says that under the present screen basis the manner in which the coal is passed over the screen is a matter of continuous controversy between miners and operators, as a result of which miners have successfully insisted that the coal be allowed to pass over the screen in a continuous, uninterrupted stream, so that much fine coal, adhering to or carried by the lump coal, has been passing over the screen. Such fine coal so passing over the screen with the lump coal has the effect of deteriorating the quality of the lump coal as such and at the same time reducing the *apparent* proportion of the fine coal in the whole carload. Affiant is of the opinion that under a run-of-mine basis the miners would have no reason to object to such methods of screening as will effectively separate the fine coal from the higher grades. The result of this would naturally be to increase the apparent proportion of fine coal produced by the mine, at the same time enhancing the quality of the higher grades, but in reality very little more fine coal would be produced.

Affiant says that, aside from the two aforementioned reasons for the production of more fine coal under a run-of-mine basis than has been produced under the screen basis, he knows of no practical reason tending to a production of an undue amount or proportion of fine coal. So far as Mr. Maurer's statement to the effect that the amount of slack would be "practically doubled" or "very materially in-

creased" is concerned, affiant has to say that he heard the said Charles E. Maurer on June 2, 1914, at a convention of miners and operators held in the city of Columbus, Ohio, say publicly that in his opinion under a mine-run basis the increase in the relative amount of fine coal would be not less than 6 nor more than 12 per cent of the total output, stating positively that he believed that 12 per cent would be the largest possible increase.

Respecting Mr. Maurer's statement at page 4 of his affidavit, in reference to the efforts which have been made to renew the wage scale agreement from April 1, 1914, applicable to the Ohio field, this affiant says that he has talked to numerous miners, members and officials of the United Mine Workers of America, and has heard them repeatedly express themselves in the most positive terms, both publicly and privately, to the effect that the Ohio miners would not renew the agreement of 1912-'14, providing for the screen basis of compensation, under any circumstances, whether the recent act of the Ohio Legislature be held constitutional or not; that, other means of securing the run-of-mine basis failing, they would wage industrial warfare in order to secure what they believed to be their rights. So that affiant believes that Mr. Maurer's statement to the effect that the old agreement would have been continued for a further period of two years but for the statutes of the State of Ohio changing the method of mining and weighing coal referred to in the bill in this case, has no foundation whatever in fact.

Affiant further says that Mr. Maurer's estimate of the cost of changing the tipples and loading devices at present in use in the mines in the State of Ohio is evidently based upon a misconception as to the meaning and effect of the law set forth in the bill in this case. Mr. Maurer's statement is that the change to which he refers is such as to make possible the weighing of the coal "before the same is screened." Affiant says that there is nothing in the new law, which was prepared by the commission of which he

was a member, requiring the coal to be weighed before it is screened. The operator is permitted to screen his coal and remove the impurities, providing he pays for all the permissible coal contained in the mine car. The screens may be used as they are at the present time and the lump coal and fine coal weighed separately. No change whatever in the tipple is necessary to be made excepting the installation of hopper scales to weigh the fine coal. The cost of such installation would be between one hundred and twenty-five dollars and one hundred and fifty dollars for each tipple, which would be from twelve thousand to twenty-one thousand dollars for the State of Ohio.

Affiant says that the changes which he speaks of are the only ones absolutely necessary, and that if Mr. Maurer has in mind other changes for the purpose of producing higher grades of coal, his figures do not relate to such changes.

Referring to Mr. Maurer's statement on page 6 of his affidavit relative to the attempts that have been made to establish a proper competitive run-of-mine basis for all mines in Ohio, this affiant refers again to the statement hereinbefore made relative to the attitude of the miners toward the renewal of the screen basis.

Affiant says that he has noted Mr. Maurer's objection to the determination by the Industrial Commission of Ohio of the allowable percentage of impurities which may be loaded with coal on the ground that the publication of such a percentage will work a detriment to Ohio coal wherever it comes into competition with coal produced in other States. Affiant, from his knowledge of the coal-mining industry in this and other States, and the investigations made by him as a member of the Coal Mining Commission of Ohio, states that there is a well-known practice on the part of miners and operators alike, existing throughout the bituminous coal fields of the United States, to market impure coal during times of great demand; that the impurities which occur in coal seams throughout the bituminous

coal fields are similar, so that Ohio coal is no more likely to have such impurities in it than is the coal produced in any other State; that so far from the standardization of the quality of Ohio coal constituting a detriment to the Ohio operators in the markets where that coal competes with the coal of other States, affiant is of the opinion that it will prove a positive advantage to them, in that Ohio coal will virtually be sold under the law and the regulations of the Industrial Commission upon a guaranteed standard of purity, whereas coal from other States will not be marketed under such conditions unless the legislation of other States is conformed to that of Ohio.

Relative to Mr. Maurer's statement that no injury could result to the miners in the State of Ohio or to the State of Ohio itself by continuing existing conditions until a full hearing can be had and the validity of the legislation attacked in the bill filed in this case finally determined, affiant says that he is convinced that there is not the remotest possibility of coal ever being produced again in the State of Ohio upon the coal-screen basis. The granting of a temporary restraining order in this case will not have the effect of reopening the coal mines; on the contrary, it will serve only to encourage a small number of operators in the State of Ohio in an attitude which they have assumed (and which is not followed by the majority of the operators in said State), viz: the attitude of insisting upon the screen basis and resisting the adoption of the run-of-mine basis, whether by agreement or under the sanction of legislation. So long as such operators continue in this attitude and the miners continue in the attitude which they have assumed, as affiant has hereinbefore stated, the mines will not be operated and the miners in the State of Ohio and the public generally will suffer very serious hardships.

Affiant further says that a convention of miners and operators in Ohio and other fields was held in the cities of Philadelphia and Chicago in the month of April, 1914, and

at such conventions the efforts referred to in Mr. Maurer's affidavit, looking toward wage scale agreements for the two years beginning in 1914, were made. Affiant has talked with Mr. Maurer and with other operators and with officials of the United Mine Workers of America respecting the proceedings of said conventions, and upon information and belief says that the mine operators in the Ohio field offered to the miners at such conventions a wage scale based upon the separate weighing of lump and fine coal, but providing compensation for all the coal brought out of the mine, which is all that the legislation complained of in this action requires. Affiant believes that said offer so made by the operators was entirely voluntary on their part and was made without reference to the legislation involved in this case. Affiant is informed that said offer was rejected by the miners because of the scale of compensation provided for therein.

Affiant further says that there is at the present time a convention of miners and operators in the Ohio field being held in the city of Columbus; that Mr. Maurer, who makes affidavit in this case, attended said convention and acted as spokesman and representative of the operators; that affiant attended said convention and heard the said Mr. Maurer on June 2, 1914, offer on behalf of the operators to the miners a certain wage scale based on the run-of-mine basis, conditioned upon the privilege of going back to the screen-coal basis if the present litigation should terminate favorably to the operators; but said proposal was rejected by the miners, whether because of the annexation of the condition or because of the amount of compensation affiant is unable to state.

Affiant refers the court generally to the contents of the report of the Ohio Coal Mining Commission attached hereto, in which many of the matters to which Mr. Maurer and affiant refer, are quite fully discussed. Further deponent saith not.

Sworn to before me and signed in my presence this 3rd day of June, A. D. 1914.

_____,
Notary Public in and for Franklin County, Ohio.

IN THE DISTRICT COURT OF THE UNITED STATES,
 NORTHERN DISTRICT OF OHIO, EASTERN
 DIVISION.

In Equity.

RAIL AND RIVER COAL COMPANY, *Plaintiff,*
vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, AND THOMAS
 J. DUFFY, *as Members of and Constituting The Industrial
 Commission of Ohio, Defendants.*

Bill.

*To the Honorable the District Judges of the Northern Dis-
 trict of Ohio, Eastern Division:*

Rail and River Coal Company, a corporation, brings this, its bill of complaint, against Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, and thereupon said plaintiff complains and alleges:

I.

Said plaintiff is and has been for a long time past a corporation organized and existing under the laws of the State of West Virginia, and is a citizen of said State of West Virginia, and a resident thereof.

II.

That the said defendants, Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, are citizens and residents

of the State of Ohio, defendant Wallace D. Yapple, residing at Chillicothe, Ohio, defendant Mathew B. Hammond, at Columbus, Ohio, and defendant Thomas J. Duffy, at East Liverpool, Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this court.

Said defendants are the duly appointed, qualified and acting members of The Industrial Commission of Ohio, having been appointed as such members under and pursuant to an act of the Legislature of the State of Ohio, entitled "An act creating The Industrial Commission of Ohio," passed March 12, 1913, approved by the Governor of said State March 18, 1913, and duly filed in the office of the Secretary of State on March 20, 1913. Said defendant, Wallace D. Yapple, is chairman, and said Mathew B. Hammond is vice-chairman of said commission. Said act is set forth at length in the Session Laws of the State of Ohio for the year 1913, volume 103, pages 95 to 110, both inclusive, to which act, for the full text thereof, complainant begs leave to refer as fully as though the same were at length incorporated herein.

That under and by the terms of section 22 of said act it is made the duty of said Industrial Commission, and it is given the power, jurisdiction and authority on and after the first day of September, 1913, to administer and enforce the general laws of the State of Ohio relating to mines, manufacturing and other establishments. Under the provisions of sections 18, 19, 20, 21, 22, and 35 of said act, said Commission is given extensive inquisitorial powers, and it is made the duty of all employers to furnish to said Commission information pertaining to their private business affairs, to enable it to carry into effect the provisions of said act and the orders of said Commission made thereunder, and said employers are required to make specific answers under oath to all questions submitted to them by said Commission, and to give said Commission access to their establishments and places of business. Under the provisions of

section 36 of said act said Commission is given authority to direct the prosecution of any action, proceeding, investigation, hearing or trial relating to matters within its jurisdiction, and upon the request of said Commission it is made the duty of the attorney general of Ohio or the prosecuting attorneys of the various counties in said State to aid said Commission and prosecute under the supervision of said Commission all necessary actions or proceedings for the enforcement of said act and for the punishment of all violations thereof.

III.

Said plaintiff is now and for many years last past has been actively engaged in the State of Ohio in the business of mining and selling coal, and now owns and for a long time past has owned in said State a large acreage of coal lands, consisting approximately of 32,000 acres, of the value of more than \$1,000,000, upon which said lands said plaintiff has four coal mines properly developed, in which it employs upward of 2,000 persons, and from which said mines said plaintiff's average daily production is about 2,800 mine cars of two tons each of coal; that among said employees of plaintiff are about 1,700 persons who are paid on the basis of the ton for mining or loading coal.

IV.

Plaintiff further shows to the court that the business of coal mining in the State of Ohio is very large; that there are about six hundred (600) coal mines in said State, in which there are employed upwards of 45,000 persons; that upwards of 36,000,000 tons of coal were produced in the year 1913, and there was expended in wages to said employees in said year upwards of \$26,000,000.

V.

Plaintiff further shows to the court that Western Pennsylvania, the States of Illinois and Indiana are likewise large producers of coal; that the mines located in these States are in close competition with each other and with the mines in the State of Ohio in the sale of the coal produced by their respective properties; that a great majority of the operatives engaged in the coal-mining business in said States are members of an organization known as The United Mine Workers of America. That for many years last past it has been the custom for said mine operatives, through their representatives in said organization, under arrangements made with the various coal operators in the said States, to enter into contracts with said operators for the period of two years, whereby the interests of said operatives and their employers have been subserved by securing reasonably uniform wages for the different kinds of labor performed in said mines; that the last agreement entered into was for the period of two years, expiring on April 1, 1914.

That it has been for many years last past the custom and practice of large users of coal, such as railroads and large manufacturing concerns, to make contracts for their fuel requirements by the year, and that many of said contracts expired about April 1, 1914, or will expire in the immediate future, and practically all of them prior to May 20, 1914.

VI.

Plaintiff further shows to the court that the wage agreement referred to, which expired April 1, 1914, as well as several of said agreements theretofore made, covering the wages of such mine operatives as are paid by the ton in the said States of Pennsylvania, Ohio, and Indiana, provided for the screening of coal and for payment of wages at a cer-

tain price per ton for lump coal, to wit: such coal as would pass over a bar screen of certain dimensions, wherein the bars were $1\frac{1}{4}$ inches apart; of said four States, the mines in said State of Illinois alone operating upon any other basis, except that in the State of Indiana the operators, at their option, paid on a mine-run basis also, and plaintiff states to the court that said method of screening coal and paying the miners and loaders thereof upon the basis of such coal as will pass over said screen is designed and well calculated to induce carefulness in mining, in that said loaders and miners exercise greater care in the manner in which charges of powder are placed to break down said coal, and in the manner in which said coal is loaded after the same is broken down, and the safety of the operatives is much enhanced because of the better condition of the roof of the mines, growing out of the smaller charges of powder used therein.

That for the reasons aforesaid, those engaged in the mining business operate their mines more economically and in a safer manner, and coal of a better grade is produced when the miners and loaders are paid upon the lump-coal basis.

VII.

Plaintiff further says that by section 970 of the General Code of Ohio the owners and operators of coal mined in said State are required to permit their mine operatives to employ, and it is the universal custom in said State for such operatives to employ, a representative known as check weighman, whose duty and right it is to examine the scales and screening apparatus and machinery at the mine, and see the coal weighed and check such weights, and make a correct record thereof. By this law the operatives are protected and secured against any false weight or improper screening of their coal, and from any improper deductions from the coal mined or loaded by them.

VIII.

Plaintiff further shows to the court that on the 20th day of May, A. D. 1914, there will become effective a certain act of the General Assembly of Ohio, known as Senate Bill No. 3, entitled "An Act to Regulate the Weighing of Coal at the Mines," which was duly passed by the General Assembly of Ohio on or about February 5, 1914, approved by the Governor of the State of Ohio on February 17, 1914, and filed in the office of the Secretary of State on February 20, 1914, "a true copy of which is hereto attached, marked Exhibit A" and made a part hereof.

IX.

That in and by the terms of said act it is provided that every miner and every loader of coal in any mine in this State who, under the terms of his employment, is to be paid for mining or loading such coal on the basis of the ton, or other weight, shall be paid for such mining or loading according to the total weight of all coal contained within his car in which the same shall be removed from out of the mine, unless the contents of such car when so removed shall contain a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the said The Industrial Commission of Ohio.

X.

It is further provided in said act that said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt or other impurities unavoidable in the proper mining or loading of the contents of the several cars of coal in the several operating mines in said State of Ohio, and said Commission is given power to change, after investigation, any percentages ascertained or determined by it from time to time as it shall deem necessary.

XI.

It is further provided in said act that it shall be the duty of the miner or loader of coal, and his employer, to agree upon and fix for stipulated periods of time the percentage of fine coal allowable in the output of the mine wherein such miner or loader is employed, and if such agreement is not made the said Industrial Commission is authorized to fix and determine the same. Said Commission is also empowered to change from time to time the percentage of fine coal which may be so lawfully loaded. Said Industrial Commission, if it finds that for a period of one month there shall be produced a greater percentage of fine coal than that fixed and determined by it, is authorized to make and enforce such orders relative thereto as will result in reducing the percentage of such fine coal to that fixed by said Commission.

XII.

It is further provided in said act that it shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of the contents thereof over a screen or other device for the purpose of ascertaining or calculating the amount to be paid to such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished, and it is provided that any person, firm or corporation who shall violate such provision in respect thereto shall be deemed guilty of a misdemeanor, and upon conviction shall be fined for each separate offense not less than \$300 nor more than \$600.

XIII.

It is further provided in said act that any miner or loader of the contents of the mine car who loads a greater percent-

age of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by said Industrial Commission shall be guilty of a misdemeanor, and upon conviction shall be punished for the first offense within a period of three days by a fine of fifty cents; for a second offense within such period by a fine of one dollar; and for a third offense within such period by a fine of not less than two dollars nor more than four dollars.

XIV.

Plaintiff further shows to the court on information and belief that on or about the — day of February, 1914, and pursuant to said custom of entering into said biannual contracts, the various operators engaged in the mining of coal in the said States of Ohio, Pennsylvania, Indiana, and Illinois, by their representatives, met and conferred with the duly authorized representatives of their employees in the city of Philadelphia, Pennsylvania, with the view to making a wage agreement covering the employment of said operatives in all said four States for the period of two years, beginning with April 1, 1914; that at said meeting said operatives demanded that in the State of Ohio coal should be mined and produced, and the wages of miners and loaders be determined, in all respects in conformity with said act of the General Assembly, and in no other manner; that said meeting was adjourned without agreement; that later, on or about the — day of March, 1914, a further meeting was convened in the city of Chicago, Illinois, at which the operatives repeated the same demand with respect to the methods of mining and paying for the coal mined in the State of Ohio, but offered to renew, unmodified so far as weighing and screening of coal was concerned, the contracts expiring on April 1, 1914, in respect to the business of coal mining in the States of Pennsylvania, Illinois, and Indiana, but no offer or proposition was made to make any contract

with respect to the mining of coal in Ohio, except upon the basis of the said act of the Ohio Legislature aforesaid.

XV.

Plaintiff further shows to the court on information and belief that the operators of coal mines in the State of Ohio (among which is the plaintiff herein) were ready and willing to renew, to take effect on April 1, 1914, for the period of two years, the contract which expired on said date, and that the inability to reach such an agreement with their operatives was largely, if not wholly, due to the existence of said act aforesaid prescribing the methods of mining and determining the basis of wages of said miners and employees, and delegating to the said Industrial Commission the powers therein prescribed, and fixing and prescribing the penalties that would be incurred by said operators and said employees for any violations thereof.

XVI.

Plaintiff further shows to the court on information and belief that on April 1, 1914, the owners and operators of mines in the State of Ohio, being unable to secure men to operate their said mines upon the basis and terms upon which said mines had been operating for two years theretofore, were compelled to close down said mines, to their great detriment and damages, and that plaintiff was required for said reasons to close down its mines, to its great loss and damage.

XVII.

Plaintiff further charges that said act, to wit: said Senate Bill No. 3 is unconstitutional and void, and of no effect whatsoever, for, among other reasons, the following, to wit:

- (1) It violates the Fourteenth Amendment to the Fed-

eral Constitution, in that it abridges the privileges and immunities of the plaintiff, and deprives it and other persons similarly situated of the liberty of contract, and constitutes an unwarranted and arbitrary interference with plaintiff's right to manage its business of mining, producing and selling coal according to its own judgment, and takes the property of the plaintiff and others similarly situated without due process of law.

(2) Said act confers authority and power on said Commission and requires it to determine for each operator and each miner and loader in the State, who is paid by the weight, the percentage of impurities unavoidable in proper mining or loading of coal in cars and the allowable percentage of slack or fine coal, thus depriving the said operator and his employees of the right to determine, bargain, and contract for the quality of coal to be produced from said mine, all in violation of said Fourteenth Amendment.

(3) In conferring power on said Industrial Commission to prescribe the percentage of fine coal that may be loaded and the percentage of slate, sulphur, and other impurities that may be loaded with the coal, and prescribing penalties for violations thereof by the miner or loader, said act constitutes an unwarranted interference with the rights and liberties of said miner and loader, and with his freedom of contract with his employer; and likewise, in requiring the operator to accept and pay for coal of a quality fixed by said Commission, said act interferes with the freedom of the employer to fix and determine the quality of the product of his mine and interferes with the freedom of the employer and the employee to contract with each other,—all in violation of said Fourteenth Amendment.

(4) The duties devolving on said Commission under said act, if exercised pursuant to the powers conferred on said Commission by the act creating said Commission, and especially by Sections 18, 19, 20, 21, and 22 thereof, authorize and require said Commission to investigate and in-

quire into the private business affairs of the operator, all in violation of the rights secured to said operator by the Constitution of the United States, and especially the Fourteenth Amendment thereof.

(5) The plan provided by said act of fixing the quality of said coal by said Commission, that may be lawfully mined and loaded, is wholly impracticable in the daily business operations of a mine and would result in material and arbitrary interference with the operations of the mine, in violation of said Fourteenth Amendment.

(6) Said act is not within the police power or any power of the State of Ohio. Is is not designed nor intended to promote nor protect, nor does it bear any relation to the health, safety, nor general welfare of the public. It is not intended nor designed to prevent fraud upon the operatives in coal mines. Said operatives, by section 970 of the General Code of Ohio, are specially empowered to and in fact do, by universal custom, supervise, check, and determine the weighing and weight of all coal produced.

(7) The penalties and fines prescribed in section 6 of said act, to-wit: Senate Bill No. 3, are so extreme and cumulative as to deter and prevent any person, firm, or corporation described in said act, and subject to its provisions, from challenging the validity thereof, and such persons, firms, or corporations are thereby constrained to submit to the provisions of said act rather than take the chance of the penalties imposed. The minimum fines prescribed in said section 6 of said act would amount, in plaintiff's case, to over \$800,000.00 per day for each day's operation of plaintiff's property.

Said act, for the reasons herein mentioned, denies to this plaintiff and to other persons similarly situated, the equal protection of the law as secured and guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

XVIII.

Said act is likewise unconstitutional and void in that it violates section 1 of article 1 of the constitution of the State of Ohio, in prohibiting the freedom of contract therein guaranteed and secured.

XIX.

Said act is further in violation of the constitution of the State of Ohio in that it delegates legislative authority to said Industrial Commission, in violation of section 1 and section 26 of article 2 of said constitution.

XX.

Said act is further in violation of section 16, article 2, of the constitution of Ohio, which provides that no law shall embrace more than one subject, which shall be clearly expressed in its title, in that the title to said act relates exclusively to the weighing of coal at the mine, while said act purports, in the body thereof, to confer upon said Industrial Commission wide powers of inspection and supervision of the manner and methods of mining coal, and empowers said Commission to determine the quality of coal, which shall be paid for as such, and the contents of mine cars, which shall be binding upon employees and employers, regardless of their contracts in reference thereto.

XXI.

Plaintiff further shows to the court that because of said act, said Senate Bill No. 3, and the uncertainty in respect to the constitutionality thereof, plaintiff's mines are closed down as aforesaid, and plaintiff is unable to make or accept contracts which are now being offered, and particularly contracts for periods of one year or more, which contracts are

now being taken, as plaintiff is advised and believes, by the coal operators in said States of Pennsylvania and Indiana, competitors of the plaintiff, and plaintiff is now, and before the effective date of said act, suffering great and immediate and irreparable injury by reason thereof.

XXII.

Plaintiff further shows to the court that said defendants acting as said Industrial Commission, as plaintiff is informed and believes, has taken steps and measures, or is about to take steps and measures, to put said act in full force and effect, and to that end has employed its agents and a special representative, whose duties are to assist said Commission under said act, and to make the investigations in respect to the matters and things provided for therein, and plaintiff is advised and believes that said Industrial Commission, through said representative or deputy, and its employees and other agents, is about to demand access to the mines and property of plaintiff, with a view of determining and investigating, and examining into the business of mining as heretofore conducted and carried on by said plaintiff, and plaintiff is advised that said Industrial Commission threatens to and will promptly, on May 20, 1914, put into full effect all the provisions of said act, in the meantime trespassing upon plaintiff's property and the property of other operators of coal mines in Ohio, in the making of said preliminary investigations, as hereinbefore outlined; that said proposed investigations are for the purpose provided in said act, and constitute an unwarranted and illegal inquiry into the private business affairs of plaintiff.

XXIII.

That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the enforcement of said act, and from the requirements by said defendants acting as said Industrial Commission in the enforcement thereof, and to prevent a multiplicity of suits

against the plaintiff, and to prevent prosecutions under said act and the imposition of the heavy penalties described therein, and to prevent immediate and irreparable injury which will be caused to plaintiff by reason of the fact that it is prevented from operating its mines and from accepting contracts for the sale of its coal, a writ of injunction is necessary to restrain said defendants from interfering with plaintiff and other persons similarly situated.

XXIV.

That the amount in controversy herein and the value of the matters disputed herein, and the loss which the plaintiff is sustaining by the threatened enforcement of said act, and the damages to plaintiff, as hereinbefore set forth, will greatly exceed the sum of three thousand dollars (\$3,000.00), exclusive of interest and costs.

XXV.

Inasmuch, therefore, as plaintiff has no remedy in the premises, save in a court of equity, plaintiff prays the aid of the court;

1. To the end that the said Wallace D. Yapple, Mathew B. Hammond and Thomas J. Duffy, defendants herein, as members of and constituting The Industrial Commission of Ohio, may, without oath (answer on oath being expressly waived), full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged.

2. To the end that said act, Senate Bill No. 3, may be decreed to be unconstitutional and void and of no effect whatsoever.

3. To the end that plaintiff may be decreed to have the right to operate its mines and property, and to mine and sell its coal, without compliance in any way with the restrictions in said act set forth and with the regulations and orders of said Industrial Commission thereunder.

4. To the end that plaintiff, its agents and employees may be secured against unlawful and illegal trespassing and arrests, fines, and penalties by reason of any alleged violation of said act.

That the said Wallace D. Yapple, Mathew Hammond, and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, their agents, deputies, representatives, attorneys and employees of every kind whatsoever, may be perpetually and forever restrained by the order and injunction of this court from—

(a) Enforcing and attempting to enforce any of the provisions of said act, said Senate Bill No. 3.

(b) From entering upon plaintiff's premises for the purpose of making, with respect to said Senate Bill No. 3, any investigation pretended to be authorized by said act of the legislature of Ohio creating said Industrial Commission.

(c) Making or establishing any rules or regulations in respect to the amount of fine coal or the amount of impurities to be loaded into cars at plaintiff's mines, or to be taken as a basis for, or considered in connection with, the wages to be paid to and received by said miners and loaders of coal.

(d) Beginning any action of any nature whatsoever against plaintiff, its agents or employees, on account of any violation of said Senate Bill No. 3.

(e) Arresting or causing the arrest of any agent or employee of plaintiff.

And that said defendants, each and all of them, may be in the meantime so restrained during the pendency of this suit, and plaintiff prays for such other relief as it may in equity be entitled to.

XXVI.

May it please your honors to grant unto the plaintiff not only a writ of injunction conformable to the prayer of this bill to be issued to the above-named defendants, but also writ of subpoena to be issued out of and under the seal of this

honorable court, to be directed to said defendants, Wallace D. Yaple, Mathew B. Hammond, and Thomas J. Duffy, as members of and constituting The Industrial Commission of Ohio, commanding them, at a certain time and under a certain penalty to be therein specified, to be and appear before this honorable court, then and there to answer the premises, but not under oath (answer under oath being expressly waived) and to abide by the order and decree of the court therein, and that said defendants may appear herein according to law.

RAIL AND RIVER COAL CO.,
Plaintiff,

By A. C. DUSTIN, *Its Solicitor.*
HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys.

A. C. DUSTIN,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, Cuyahoga County, ss:

W. R. Woodford, being first duly sworn, upon his oath deposes and says that he is the president of the Rail and River Coal Company, plaintiff in the foregoing action, and duly authorized in the premises; that he has read the statements and allegations contained in said bill and knows the contents thereof and that the same are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

W. R. WOODFORD.

Sworn to by the said W. R. Woodford and subscribed by him in my presence this 16th day of April, 1914.

[SEAL.]

ADRIAN A. WYCHGEL,
Notary Public.

Exhibit "A."

(SENATE BILL NO. 3.)

*An Act to Regulate the Weighing of Coal at the Mines.**Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine: *Provided*, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust, and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed

and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force exceeds the percentage so fixed by it said industrial commission shall at once make, enter, and cause to be enforced such order or orders relative to the production of coal at such mine as will result in reducing the percentage of such fine coal to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this State which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents whereby the total weight of such contents shall be reduced or diminished. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car containing a greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: For the first offense within a period of

three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar, and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars: *Provided*, That nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

C. L. SWAIN,

Speaker of the House of Representatives.

W. A. GREENLUND,

President of the Senate.

Concurred February 5, 1914.

Approved February 17, 1914.

JAMES M. COX, *Governor.*

I hereby certify that the foregoing is a true copy of the engrossed bill.

_____,
Secretary of State.

Filed in the office of the Secretary of State February 20, 1914.

(Preliminary Restraining Order. Entered May 23, 1914, by Hon. John W. Warrington, U. S. Circuit Judge; Hon. J. E. Sater, U. S. District Judge, and Hon. John M. Killits, U. S. District Judge.)

No. 233. Equity.

RAIL AND RIVER COAL COMPANY

vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS J. DUFFY, *as Members of and Constituting the Industrial Commission of Ohio.*

This cause having been argued before and submitted to the court, consisting of Hon. John W. Warrington, Circuit Judge; Hon. John E. Sater, District Judge, and Hon. John M. Killits, District Judge—such court having been constituted pursuant to section 266 of the Judicial Code—upon motion for an interlocutory injunction as prayed in the bill, and such motion, after due consideration by such court, having been denied, as appears by its *per curiam* opinion and order heretofore filed and entered in the cause, and such court having inadvertently and erroneously assumed that preliminary restraining order had been previously granted pursuant to section 266 of the Judicial Code, and so provided for suspension of its order of denial herein for a period of fifteen days to enable complainant to take an appeal to the Supreme Court of the United States if it should so desire; now it is hereby ordered that a temporary restraining order be, and such order hereby is, granted as prayed in the bill of complaint herein until the 4th day of June, 1914 (on which day said order shall expire), for the purpose of enabling complainant, if it shall so desire, to appeal the cause to the Supreme Court of the United States and there apply for an order of suspension or supersedeas in the cause.

UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF OHIO, EASTERN DIVISION.

No. 233. Equity.

RAIL AND RIVER COAL COMPANY, *Plaintiff,*
vs.

WALLACE D. YAPLE, MATHEW B. HAMMOND, and THOMAS
J. DUFFY, *as Members of and Constituting the Industrial*
Commission of Ohio, Defendants.

On Application for an Interlocutory Injunction.

Decided May 20, 1914.

Before Warrington, Circuit Judge, and Sater and Killits,
District Judges.

Per Curiam:

The plaintiff, a West Virginia corporation, a large producer of coal and employer of mine laborers, of whom there are more than 45,000 in Ohio, assails the constitutionality of the Ohio law of February 5, 1914, entitled "An Act to Regulate the Weighing of Coal at the Mines," and asks for an interlocutory injunction against the defendants, who constitute the Industrial Commission of Ohio, to prevent them from enforcing and attempting to enforce any of the provisions of such act. The act, in so far as it need be considered, is set forth in the margin. Diversity of citizenship

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine: *Provided*, the contents of such car when so removed shall

and the presence of Federal questions confer jurisdiction. *Silver vs. Louisville & Nashville R. R. Co.*, 213 U. S., 175, 191; *Michigan Central R. R. Co. vs. Vreeland*, 227 U. S., 59, 63, 64; *Louisville & Nashville R. R. Co. vs. Siler*, 186 Fed. Rep., 176, 179; *Ohio River & W. Ry. Co. vs. Bitty*, 203 Fed. Rep., 537, 589; *Mutual Film Co. vs. Industrial Commission of Ohio*, decided in this district April 2, 1914.

The Ohio Coal Commission, appointed by virtue of a joint resolution of the General Assembly (103 Ohio L., 981) "to investigate and report an equitable method of weighing coal

contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal, commonly known as nut, pea, dust, and slack, allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith, upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month, during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter, and cause to be enforced such order or orders relative to the production of coal at such mine as will result in reducing the percentage of such fine coal to the amount so fixed by said industrial commission.

at the mines, when the employees are to be paid for their labor on the basis of weight, measure, or quantity, and that will at the same time be to the best interest of the consumers and protect the coal measures of the State," submitted a report in December, 1913, in which, following a review of the evidence and arguments of both operators and miners, it recommended for passage a bill which finally assumed the form of the present act. The information thus brought to the attention of the General Assembly and to which counsel

SECTION 4. * * *

SECTION 5. Said industrial commission shall have full power from time to time to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents whereby the total weight of such contents shall be reduced or diminished. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car containing a greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: For the first offense within a period of three days he shall be fined fifty cents; for the second offense within such period of three days he shall be fined one dollar, and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars: *Provided*, That nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt, or other impurity."

in the present hearing freely alluded, in so far as deemed material, is summarized in the next succeeding paragraph and is as follows:

All mine employees are required to belong to the United Mine Workers—the strongest labor organization in the country. They have had no difficulty in the past in securing fair wages. The system of paying miners long in vogue in nearly all Ohio mines originated when only lump coal was marketable and is based on the amount of coal mined and passed over a 1¼-inch screen, which amount is assumed to be 28 per cent. The insistence of the miners that they are paid for but a part of the product of their labor began when the finer grades of coal became salable. Their persistent grievance, although it will not bear analysis, engendered disputes and bitter feeling between them and their employers. A statute (section 956, General Code of Ohio) whose purpose is the avoidance of danger, especially in gaseous mines, wisely requires the removal of fine coal and coal dust from the mines, for the violation of which (sec. 976, G. C.) the offender may be punished by fine or imprisonment, or both; but the miners, believing their grievance to be just, have not always removed such coal and dust and thereby neither obviate such danger nor conserve the coal supply. Generally stated, from 20 per cent to 50 per cent of the coal under the heretofore prevailing systems of mining has been left in pillars, ribs, and stumps. The coal so left deteriorates from exposure, becomes somewhat crushed by the overlying strata, and yields a more than ordinary percentage of fine coal, in consequence of which the miners either wholly refuse to draw such supports or decline to do so unless paid a sum additional to the regular contract price. In many instances, on account of such unwillingness, those portions of mines which yield an unusual amount of fine coal have been abandoned and the fuel so indispensable to industrial progress is lost. On account of dissimilarities in the character of coal the quantity of fine coal produced

varies in different mines and even in different portions of the same mine—the variations in some instances being quite marked. The result is a variation in the wages of miners of equal skill and ability and an advantage to operators obtaining an excess of fine coal as against the miners, and also as against other operators in districts in which an effort is made to secure as large a percentage of lump coal as is possible. The increased openings between screen bars, resulting from the wear incident to use, diminish the quantity of lump coal passing over such bars to the loss of the miner. The failure to substitute new screens is due in part to the negligence of the check weighman, authorized by statute (sec. 970, G. C.) and selected and paid by the miners to call attention to the defective character of the screens, and in part to the carelessness of the operators in failing to maintain screens conforming to their contract. Each, however, charges the other with the responsibility of such failure, and instances have occurred in which the miners have struck and closed down mines on account of disputes and delays regarding the furnishing of new screens. Neither the charge that the operators so dump mine cars as to break the coal (by an excessive drop from such cars to the screens, for instance) nor the counter-charge that the miners will not permit such dumping as will eliminate the fine from the lump coal is proved; but the cupidity and the carelessness of each are deemed factors worthy of consideration. If coal be shot from the solid, payment on the mine-run basis will result in an increased quantity of fine coal. Whether such increase will occur if the coal is undercut before it is shot down, as was done with about 95 per cent of the coal mined at the time the report was filed, is, in view of the experience in other States having kindred statutes and the difference in the Ohio coal from that of other fields, problematical. If an increase occurs, it will operate quite prejudicially to the sale of Ohio coal. The adoption of the mine-run system will also cause, to the prejudice of the operators, a considerable increase in

the amount of impurities brought to the surface, unless some way be found to protect the operator from the carelessness and indifference of the miner, and will require the inauguration of some method of cleaning. It will also necessitate some increased expenditure in the readjustment of tipples. The commission, in view of its findings so summarized as above, concluded that the present system of mining is inequitable, unjust, and productive of discontent. To obviate existing conditions and to conserve the coal by supplying an incentive to employees to remove pillars, ribs, and stumps and the portion of mines yielding more fine coal than is usual and to load and send from the mine the fine coal which is now left underground, the commission recommended that shooting from the solid be prohibited and that the mine-run system of payment be adopted, but so safeguarded as to apply to clean coal only, *i. e.*, coal so cleaned as to be marketable.

The plaintiff charges that the act, in lodging in the Industrial Commission the duty of determining the percentage of impurities unavoidable in the proper mining or loading of coal, and of fixing, in case of disagreement between the mine operator and his employees and until they subsequently agree, the percentage of fine coal allowable in the output of the mine, unreasonably, unnecessarily, and arbitrarily deprives the operator, whose business, it is alleged, is strictly private and unaffected by any public interest, from contracting with his employees for the production of coal containing more impurities or having a greater degree of purity than that which the commission has fixed, and denies him the right to reject and requires him to accept and to make payment for the total contents of each mine car, without deduction or diminution, so long as the percentage of impurities fixed by the commission is not exceeded. It avers that the act is not designed to protect the morals, health, or safety of the public or of mine employees and has no real or substantial relation as between the purposes attributed to it and the means devised for attaining such purposes, but has for

its object the regulation of the relations between masters and such of their servants as are paid by weight for coal mined or loaded; and that it is therefore unconstitutional in that it deprives the plaintiff of liberty and property without due process of law and of the equal protection of the law as guaranteed by the Fourteenth Amendment and the Ohio bill of rights.

The act must be sustained, unless it can be clearly shown to be in conflict with some constitutional provision (*Board of Health vs. Greenville*, 86 Ohio St., 1, 20; *Schmidinger vs. Chicago*, 226 U. S., 578, 587, 588; *Mutual Film Co. vs. Industrial Commission of Ohio*, *supra*). It came into existence through a claimed exercise of the police power, a power which extends to the making of regulations "promotive of domestic order, morals, health, and safety" (*Railroad Co. vs. Husen*, 95 U. S., 465, 471). Laws enacted in its appropriate exercise have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (*Camfield vs. U. S.*, 167 U. S., 518, 524), to promote harmonious relations between capital and labor (*McLean vs. U. S.*, 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (*Peel Splint Coal Co. vs. West Virginia*, 36 W. Va., 802; *Knoxville Iron Co. vs. Harbison*, 183 U. S., 13, 21), to provide for the safety and health of miners (*Freund, Police Power*, sec. 115; *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals, and other natural resources (*Barrett vs. Indiana*, 229 U. S., 26, 29; *State vs. Ohio Oil Co.*, 150 Ind., 21; *Ohio Oil Co. vs. Indiana*, 177 U. S., 190; *Hudson Water Co. vs. McCarter*, 209 U. S., 349; *Wilmington Star Mining Co. vs. Fulton*, 205 U. S., 60).

The rule announced in *McLean vs. Arkansas*, *supra*, which involved a statute akin to that here under consideration, has subsequently been so often approved by the Supreme Court as to be controlling in the present instance, if

the Ohio act is not materially different from that of Arkansas and is free from the constitutional infirmities which resulted in the overthrow of the earliest statute for the weighing of coal before screening (93 Ohio L., 33; *In re Preston*, 63 Ohio St., 428). It is contended that the McLean case is not an authority on account (among other things) of the powers conferred on the Industrial Commission, the alleged absence of a provision granting to operators the right, under proper circumstances, to reject coal brought to the surface, the possibly heavy penalties that may be imposed on offending operators, and the alleged obscurity and uncertainty of the penalties to which transgressing employees will be subjected and that the act must be held to be in excess of the State's police power and contrary to its declared policy in view of the Preston case, which pronounced invalid a law less vulnerable, it is claimed, to constitutional objection. None of the State courts has passed upon the present statute. The courts may declare the public policy when the law-making power is silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law enumerated the subjects of legislative action, such constitutional provision and statutes enacted in harmony therewith must be enforced and not nullified by the courts (*Probasco vs. Raine*, 50 Ohio St., 378, 391). Subsequent to the decision of the Preston case, the State constitution was amended by adding to article 2 the following sections:

"SECTION 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

"SECTION 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Without determining the soundness of the argument that the act, indirectly at least, establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety and general welfare of employees. Furthermore, section 36 was designed to limit by appropriate legislation the freedom of contract as regards the methods of mining, weighing and measuring coal. We are not prepared to hold that the legislature, acting within the scope of that section, may not say that the business of mining coal is so far affected with a public interest as to justify appropriate regulation of the manner of paying employees when they are to be paid according to the quantity produced and when such regulatory statute will operate to allay discord and strife and conserve the coal supply.

The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month or year, or in any other manner (except as to quantity) that the operator may deem proper. If the miner or loader by the terms of his employment is to be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car, such contents to include, however, no greater percentage of slate, sulphur, rock, dirt or other impurities than is unavoidable, as determined by the Industrial Commission. If the employé should send to the surface an excess of such impurities, or of any of them, the operator is not required to accept the car or pay for its contents as delivered, but is at liberty to agree with him as to the deductions to be made on account of impurities. If no agreement is made the offending employé may be prosecuted for his violation of the commissioners' order as for a misdemeanor. If he be

unable or unwilling to pay the fine imposed he may be imprisoned in the county jail until his fine and costs are paid or secured to be paid or he is otherwise legally discharged, provided that he be given credit upon his fine and costs at the rate of sixty cents per day for each day's imprisonment (sec. 13,717, G. C.). He is thus subjected to penalties which are neither obscure nor uncertain. The act does not require the operator to mingle the contents of such a car with the other coal produced or prevent his removing, by screening or otherwise, the excess of any impurities. It must be presumed that the Industrial Commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt, or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the commissioners' order, which by statute is made *prima facie* reasonable and lawful, he may petition for and obtain a hearing before the commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the State (act February 27, 1913, 103 Ohio L., 95, sections 25, 27, 38, 42; art. 4, sec. 2, Ohio Constitution). The commission may of its own motion upon investigation modify or rescind any of its prior orders. The law permits the employer and employé to stipulate as between themselves what percentage of coal commonly known as nut, pea, dust and slack shall be allowable in the output of the employer's mine. It is only in case of their disagreement that the commission may designate such percentage, and its orders in that behalf must possess the same characteristics as those above mentioned and are likewise subject to rehearing and review. If at any time for a period of one month during the operation of the mine the percentage so fixed is exceeded, the commission is required to enforce its order regardless of whom the offender may be. The act prescribes no penalty for disobedience to such an order, but if, as claimed by defendants, section 43 of the act of February 27, 1913, applies,

which we do not determine, an offending party may be fined not less than \$50 nor more than \$1,000 for his first offense and not less than \$100 nor more than \$5,000 for each subsequent offense. In either event the attitude of the employer is no worse than that of the employé. The danger of an increase in the quantity of fine coal caused by shooting from the solid may, under the act of February 5, 1914 (104 Ohio L., 161), be wholly obviated, if the operator so elects, in that shooting of that character may not be done and is made a misdemeanor, unless the operator and a majority of his miners obtain from the commission, upon application, an order permitting it.

A violation of the provisions of section 6 is made a misdemeanor punishable by fine for each distinct offense in a sum not less than \$300 nor more than \$600. If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature (*Flint vs. Stone Tracy Co.*, 220 U. S., 177). If they are not thus separate they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer, wishing to test the law, will risk the possibilities of repeated violations of the commissioners' orders.

Every argument advanced to sustain the contention that the act delegates legislative power to the Industrial Commission in violation of section 1, article 2, of the State constitution was urged against the act providing a board of censor of motion picture films, approved May 13, 1913, in the case brought by the Mutual Film Co. *vs.* The Industrial Commission of Ohio, *supra*. To state our reasons for holding the present contention unsound, as we do, would be to repeat in substance what was said to the same point in that case. We are content to abide by the conclusion there reached.

The claim that the act is in violation of section 16 of article 2 of the Ohio constitution, which provides that "no

bill shall contain more than one subject, which shall be clearly expressed in the title," is unavailing. But one subject is embraced in the act. Were it otherwise, we should follow the decisions of the State court and hold that the provisions of the constitution above quoted is directory and not mandatory (*Ohio ex Rel. vs. Covington*, 29 Ohio St., 102, 116).

In view of the above-quoted amendments to the Ohio constitution, the present act's want of similarity to that considered in the Preston case, and its general resemblance in its principal features to that of Arkansas, the instant case is ruled by *McLean vs. Arkansas* and is well within *German Alliance Insurance Co. vs. Lewis*, decided April 20, 1914, Sup. Ct. U. S. It is not repugnant to any constitutional provision, State or Federal. The prayer for an interlocutory injunction is therefore denied. In order, however, to enable complainant to take an appeal in each of the suits directly to the Supreme Court of the United States, pursuant to section 266 of the Judicial Code, and to apply to that court for orders of suspension or supersedeas, if it so desire, we have concluded to suspend the operation of the orders of denial herein for a period of fifteen days from the date of their entry.

J. W. WARRINGTON,
Circuit Judge.

J. E. SATER,
District Judge.

JOHN M. KILLITS,
District Judge.

IN THE SUPREME COURT OF THE UNITED STATES.

RAIL AND RIVER COAL COMPANY, *Appellant*,*vs.*WALLACE P. YAPLE *et al.*, *Appellees*.**Stipulation for Printing Record on Application for Restraining Order.**

It is agreed by counsel for all parties that the following papers may be printed as a record by stipulation for use on application for restraining order in this court:

1. Application in United States Supreme Court for restraining order.
2. Affidavit of C. E. Maurer.
Affidavit of D. J. Jordan.
Affidavit of W. R. Woodford.
Affidavit of John M. Roan.
3. Appellant's bill, including Exhibit A thereto attached, which is a copy of the run-of-mine coal law of the General Assembly of Ohio, passed February 5, 1914.
4. Order entered by the three judges.
5. Opinion of the three judges.

It is agreed that the foregoing is sufficient to show the merits of the question presented by the motion for restraining order.

It is further agreed that the said motion is to be called up for submission to the court on June 8, 1914, without further notice to counsel.

A. C. DUSTIN,
Counsel for Appellant.
TIMOTHY S. HOGAN,
Attorney General of Ohio.
C. D. LAYLIN,
ROBT M. MORGAN,
Counsel for Appellees.



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JUN 8 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

RAIL & RIVER COAL COMPANY, PLAINTIFF,

VS.

WALLACE D. YAPLE ET AL., DEFENDANTS.

BRIEF ON MOTION FOR A RESTRAINING ORDER.

A. C. DUSTIN,
HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Plaintiff.

A. C. DUSTIN,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

RAIL & RIVER COAL COMPANY, PLAINTIFF,

vs.

WALLACE D. YAPLE ET AL., DEFENDANTS.

BRIEF ON APPLICATION FOR A RESTRAINING
ORDER.

This is an appeal from an order of the District Court of the United States for the Northern District of Ohio denying an application for an interlocutory injunction under section 266 of the Judiciary Act of March 3, 1911. No application was made in the court below for a restraining order. When the court below denied the application for an interlocutory injunction it granted a restraining order to remain in effect until June 4, 1914, so as to preserve the *status quo* until the plaintiff could present its application to this court for a restraining order. The plaintiff has perfected the appeal, and now submits a motion for a restraining order as prayed in the bill, to remain effective until this appeal can be heard upon the merits.

That this court has power to grant a temporary restraining order in order to preserve the *status quo* pending the determination of the appeal appears sufficiently from *Omaha & C. B. St. Ry. Co. vs. Interstate Commerce Commission*, 222 U. S., 582, and the cases there cited. The court there

refers to section 716 of the Revised Statutes as the source of the court's power. That section is continued in section 262 of the Judiciary Code, which is in part as follows:

"The Supreme Court, the Circuit Courts of Appeal, and the district courts, shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In *Journal of Commerce, etc., Bulletin vs. Burleson*, 229 U. S., 600, the Supreme Court granted a restraining order against the Postmaster General pending the appeal enjoining the enforcement of a certain statute, the constitutionality of which was involved in that case.

The Judiciary Code also provides that a single justice may grant a writ of injunction in cases where the whole court is empowered to do so. Section 264 is in part as follows:

"Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court."

This application on June 4 was presented to Justice Day, at whose suggestion the motion is presented to the full bench.

The affidavits filed with this application show that the methods of paying miners and loaders of coal on the screen-coal basis have always prevailed in Ohio, and that irreparable loss will result if the *status quo* is not maintained until this case can be heard on its merits.

The loss to the plaintiff and the other operators in Ohio in being required to conform to the law, as shown in these affidavits, may be summarized thus:

1. The present system of paying miners and loaders of coal in Ohio by weight on the screen-coal basis is the growth of years of experience based upon competitive conditions

with Pennsylvania, Indiana, West Virginia, and Illinois from a market standpoint, and has formed the basis of wage agreements in Ohio for many years; that such system was arrived at after careful consideration by both miners and operators, and was adopted by mutual consent, and that any interference or disturbance of such wage arrangement in Ohio, without a corresponding change in the competitive States, will restrict and destroy the markets for Ohio coal.

2. That the present law of Ohio would compel every operator to practically rebuild and rearrange his tipples at the mines, at a very large cost and expense.

3. That the inevitable result of a mine-run system of paying the miners and loaders is to increase the per cent of slack coal, and to the extent that fine or slack coal is increased by any mining methods which may be adopted is the operator's chances for profit reduced. The loss from this source is very great.

4. That the Ohio coal meets the competition of the coal produced in the other States mentioned, and any system that will increase the cost of the Ohio coal without a corresponding increase in other States will drive the Ohio coal out of the competitive markets, and that the United Mine Workers and the coal operators in the competitive States of Pennsylvania, Illinois, and Indiana have renewed for two years the wage agreements which expired on April 1, 1914.

5. In allowing the Industrial Commission to fix and publicly announce the percentage of dirt, slate, and other impurities that may be lawfully mined, the coal produced in Ohio is placed under a handicap in all competitive markets.

Neither the defendants nor the State of Ohio will suffer any pecuniary loss by the granting of this restraining order.

The miners and loaders of coal in Ohio can suffer no loss unless their earnings under the new system of payment can be increased. The narrow margin of profit shown by the affidavits makes it self-evident that any increase in the cost of coal in Ohio cannot be made and the operators in Ohio remain in business *unless there is a corresponding increase in the cost of coal in the competitive States*. The cost of coal in such competitive States remains the same as before under the new wage agreements which took effect April 1, 1914.

We, therefore, have a case where great and irreparable injury will result to the plaintiff and the other coal operators in Ohio unless the effective date of this law shall be stayed by the court until its constitutionality may be fully determined, and where no apparent injury will be done to anybody else by the granting of such restraining order.

The relief sought by the bill in this case is an injunction against the defendants as members of and constituting the Industrial Commission of Ohio, to prevent their enforcement of or the taking of any steps to enforce the act of the General Assembly of Ohio entitled "An Act to Regulate the Weighing of Coal at the Mines." A copy of the act is attached as Exhibit A to the bill.

By the terms of this act (section 2) it is provided that the Industrial Commission of Ohio "shall ascertain and determine" for the coal mines within the State of Ohio

"the percentage of slate, sulphur, rock, dirt or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal."

Section 3 of the act makes it the duty of the miner or loader of coal and his employer to agree upon and fix for stipulated periods the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine where such miner or loader is employed, and in the event there shall not be any such an agreement.

"said Industrial Commission shall forthwith, upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed * * * shall continue in force until otherwise agreed and fixed by such miner or loader and his employer."

The Industrial Commission is empowered by this section, whenever the output of fine coal for any mine exceeds for a period of one month the percentage fixed by the Commission, to make and enforce such orders relative to the production of coal at that mine as will result in reducing the percentage of such fine coal to that fixed by the Commission.

By sections 4 and 5, the powers of the Commission are extended over mines that may thereafter be opened up, and it is given full power to change upon investigation any percentage previously fixed by it.

Sections 1 and 6 require that the miner or loader shall be paid according to the total contents of the mine car, without reduction or diminution, provided the contents of such car

"shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained by the Industrial Commission of Ohio."

Violations of section 6 are made a misdemeanor punishable by a fine of not less than \$300 nor more than \$600 for each car. What shall be done with the contents of the car in event it does exceed in impurities the percentage so specified, is not covered by the act.

Section 7 of the act makes the mining or loading of a greater percentage of slate, sulphur, rock, dirt or other impurities than that ascertained and determined by the Industrial Commission a misdemeanor punishable by certain fines.

It will be noted that the act regulates the business of coal mining in Ohio in several respects:

1. It provides for the payment of wages of miners or loaders according to the total weight of the contents of the

cars in which the coal is loaded, without any diminution therefrom by any device unless the contents of the car exceed in impurities the percentage fixed by the Commission.

2. It authorizes the Industrial Commission of Ohio to fix the percentage of impurities which the miner or loader may place in his coal car.

3. It authorizes the Industrial Commission, in the event the miner or loader and the employer have not agreed thereon, at the request of either to fix the percentage of fine coal which the miner or loader may place in his coal car, and prescribe rules to enforce obedience.

4. Disobedience of the law by the operator in failing to weigh and pay for the coal as prescribed, and disobedience by the miner or loader in exceeding the amount of impurities prescribed by the Industrial Commission, are made misdemeanors punishable as hereinbefore set forth.

There is no provision in the act which gives to the owner of a mine the right to reject coal sent to the surface by the miners and loaders so long as it possesses that degree of freedom from fine coal and impurities which the Commission has fixed; nor is there any clause which gives the mine owner and the miner the right to contract between themselves for the production of coal of a degree of purity greater than that which the Commission has fixed.

The law in effect, therefore, requires the owner of all mines to accept and pay for whatever substance their employees may send to the surface, which the Commission sees fit to denominate "coal," no matter whether such substance is suitable for his needs or the requirements of the market or not. If the mine owner desires a fine quality of coal, free from impurities—*e g.*, for such purposes as blacksmithing—he is deprived of the power of contracting with his em-

ployees for its production unless the Commission has seen fit to fix an extremely high standard of purity. On the other hand, if the mine owner is content with a coal of less purity than that fixed by the Commission, the law forbids the mine owner to produce it.

As to the amount of slack or fine coal which shall be contained in the product—if the miner and producer are unable to agree between themselves, the State again steps in and determines, through the Commission, what amount of lump and what amount of slack coal the parties must mine and accept, without regard to their respective wishes or needs.

We contend that the act in question violates both the constitution of Ohio and the Federal Constitution, because—

(1.) It interferes with the liberty of contract on the part of the operator and the miner or loader of coal.

(2.) It interferes in an arbitrary and unwarranted manner with the business of the coal operator, by delegating to the State Industrial Commission the power to regulate the business of such operator by prescribing the quality of the product of his business.

(3.) It prescribes penalties for violation of section 6 of the act so terrifying in their cumulative severity as to deny to the operator the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(4.) The offenses of the miners or loaders of coal for which penalties are prescribed in section 7 are too obscure and uncertain in their operation to be enforced.

(5.) It delegates legislative authority to said Industrial Commission, contrary to section 1 and section 26 of article 2 of the constitution of Ohio.

Excessive Penalties.

The minimum penalties prescribed in this act (section 6) for violation by the coal operator would amount in plaintiff's case to over \$800,000 for a single day's operation in violation of the law. Such penalties render the whole act unconstitutional (*ex parte* Young, 209 U. S., 123), unless they are separable from the rest of the act, in which event the penalties alone become unconstitutional and void, not affecting the validity of the rest of the act (*Wilcox vs. Gas Co.*, 212 U. S., 19, 53-54; *Railroad Co. vs. Garrett*, 231 U. S., 298; *Railway Co. vs. Commission*, 231 U. S., 457, 458).

The rule laid down in *Wilcox vs. Gas Co.* (212 U. S., 54) for determining this question, is as follows:

"When the objectionable part of the statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good (*Regan vs. Trust Co.*, 154 U. S., 362, 395; *Berea College vs. Commonwealth of Kentucky*, 211 U. S., 45, 54). This is a familiar principle."

The statute is distinctly penal and, unlike the *Wilcox* and kindred cases, has no means of enforcement, except the penalties therein provided. The penalties are therefore not separable.

Garden vs. State, 46 O. S., 607, 632.

State vs. Messenger, 63 O. S., 398, 401-2.

THE LAW AS A WHOLE VIOLATES THE CONSTITUTION OF THE UNITED STATES, IRRESPECTIVE OF THE PENALTY PROVISION.

That the right to choose one's calling, and the right to labor and follow any lawful business, and make any lawful contract in respect thereto are property within the protection of the 14th Amendment to the Constitution of the United States cannot be denied.

Slaughter-house Cases, 16 Wall., 37, 116, 122.

Allgeyer vs. Louisiana, 165 U. S., 578.

Adair vs. United States, 208 U. S., 161, 172.

The right to regulate the business of railroads arises from their being public highways (*Wisconsin vs. Jacobson*, 179 U. S., 287, 296). Other kinds of business may be regulated when affected with a public interest (*Munn vs. Illinois*, 94 U. S., 113), under which class would come grain elevators, hotels, public docks, etc.

The business of coal mining, however, is strictly a private business, unaffected by any public interest. The owner of 100 acres of coal land sustains the same relation to the State as the owner of 100 acres of timber land or agricultural lands. The constitutionality of the act in question, therefore, must rest upon the right of the State to enact this legislation under what we know as the police power.

The law does not relate to nor is it concerned with the morals, health or safety of the public, or of the employees in mines; it does not relate to nor is it concerned with the sale of coal by the producer to the public. Its purpose is to regulate the relations of master and servant in the business of coal mining.

That the legislature may, under the police power, interfere to some extent with the power and freedom of contract is not denied.

Laws regulating the relations between dealers in goods and the consuming public intrench upon the freedom of contract, but have been sustained where they affect the health or are designed to prevent fraud upon the public.

Dairy Co. vs. Ohio, 183 U. S., 238.

Arbuckle vs. Blackburn, 191 U. S., 405.

People vs. Van De Carr, 199 U. S., 552.

Storage Co. vs. Chicago, 211 U. S., 306.

Minnesota vs. Barber, 136 U. S., 313.

Schmidinger vs. Chicago, 226 U. S., 578.

Mugler vs. Kansas, 123 U. S., 623.

Legislation affecting the relations of master and servant limiting the right of contract has been sustained in a variety of cases, and it will not be unprofitable to refer to some of them, and the reasons assigned for sustaining the constitutionality of such laws.

Holden vs. Hardy, 169 U. S., 366, 395 (Health).

Muller vs. Oregon, 208 U. S., 412 (Health).

Railroad Co. vs. Arkansas, 209 U. S., 453, 571 (Safety).

Railroad Co. vs. Commerce Commission, 221 U. S., 612, 619 (Safety).

Mining Co. vs. Fulton, 205 U. S., 60 (Safety).

Such laws to be sustained must bear some real, substantial and necessary relation to the object to be attained. The courts will determine the purpose of the law from its natural and reasonable effect. Thus, in *Minnesota vs. Barber*, 136 U. S., 313, 319, a case involving an act of the State of Minnesota with respect to the inspection of cattle before slaughter, Justice Harlan, speaking for the Supreme Court, said:

“* * * In whatever language the statute may be framed its purpose must be determined by its natural and reasonable effect.”

And on page 320 Justice Harlan, after quoting with approval from *Mugler vs. Kansas*, 123 U. S., 623, 661, says:

"Upon the authority of those cases and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The object to be attained must be a lawful one and within the police power of the State before the State may interfere to annul contracts of parties *sui juris*.

In *Adair vs. U. S.*, 208 U. S., 161, 173, a case involving an act of Congress prohibiting the discharge of employees by carriers engaged in interstate business on account of membership in labor organizations, Justice Harlan, who had delivered a dissenting opinion in *Lochner vs. New York*, 198 U. S., 45, quoted with approval from the majority opinion in that case as follows:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer vs. Louisiana*, 165 U. S., 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the ex-

ercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler vs. Kansas*, 123 U. S., 623; *In re Kemmler*, 136 U. S., 436; *Crowley vs. Christensen*, 137 U. S., 86; *In re Converse*, 137 U. S., 624. * * * In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: **Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."**

And Justice Harlan then added:

"Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation."

Justice Harlan further said (page 172):

"It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him."

In *Lochner vs. New York*, 198 U. S., 45, 54, Mr. Justice Peckham, speaking for the Supreme Court, said:

"Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of liveli-

hood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.”

In the *Lochner* case, Justice McKenna reviews many of the cases affecting the relations of master and servant and restricting the right of contract, to which review we respectfully refer the court. It is to be noticed in passing that while there was a strong dissenting opinion written by Justice Harlan in the *Lochner* case, an examination of the dissenting opinion, as well as the majority opinions rendered by the Court of Appeals of New York (176 N. Y., 145) shows that the differences were largely if not wholly caused by the different views the judges took of the occupation in question—whether it was healthful or unhealthful and therefore subject to regulation as to hours of employment. In reference to this difference of view Justice Harlan says in the *Adair* case (208 U. S., 174):

“The minority were of opinion that the business referred to in the New York statute was such as to require regulation.”

In the *Lochner* case Justice Peckham further said, on page 64:

“It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. **The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether**

it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. * * * (Citing cases.) The court looks beyond the mere letter of the law in such cases. * * * (Citing cases.)"

We have heretofore commented on the fact that the statute here in question is not concerned with nor does it relate to the morals, the health, or the safety of anybody. It has, for *one of its purposes*, the weighing or measuring of the product of the employee's labor for the purpose of determining the amount of wages to be paid to him. If this were its *sole* purpose and the means provided were adequate it might be sustained.

Laws limiting or restricting the power of contract between employer and employee have been sustained as constitutional upon the theory that the two parties (employer and employee) were not on an equal footing. Such laws prevent oppression by the employer. In *Holden vs. Hardy*, 169 U. S., 366, 397, it was said:

"The fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."

Knoxville Iron Company vs. Harbison, 183 U. S., 13, which involved the construction of a state statute requiring the redemption of store or coal orders, was decided upon similar grounds.

The contrary doctrine was announced in *Frorer vs. People*, 141 Ill., 171; *Missouri vs. Loomis*, 115 Mo., 789.

Laws limiting the right of sailors to make contracts in respect to the payment of their wages have been sustained for reasons similar to those assigned in *Holden vs. Hardy*.

Patterson vs. Bark Eudora, 190 U. S., 169.

Robertson vs. Baldwin, 165 U. S., 275.

In *State vs. Railroad Co.*, 242 Mo., 339, the Supreme Court of Missouri held a law requiring payment of wages to be made twice a month constitutional, but stated that the law reached the very "verge of the police power."

In *Braceville Coal Co. vs. People*, 147 Ill., 66, an act requiring payment of wages weekly was held unconstitutional. Freund on Police Power, section 321, says:

"If we do recognize the legitimacy of the exercise of the police power for the prevention of oppression, this legislation, especially store order acts, sanctioned by the practice of most civilized countries, is within the province of governmental power. * * * The prompt payment of wages in lawful money is a reasonable incident to the contract of employment."

McLean vs. State, 81 Arkansas, 304, involved the validity of a statute of the State of Arkansas requiring coal to be weighed before it was screened where the wages of the employee were payable by the ton weight. The court held the law to be within the police powers of the State on the ground that it was designed to prevent fraud upon the employee in measuring the product of his labor upon which his wages depended. The court said:

"* * * The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal 'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'"

"The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded."

The court cited in support of this decision Freund on Police Power, sections 272 to 275.

The claim made by the Attorney General of Arkansas in his brief was that the object of the act was to see that the miner was honestly paid for his labor, and to prevent fraud in the measurement of the coal mined.

This judgment was affirmed in 211 U. S., 539. Justice Day, at page 550, after quoting at considerable length from the report of the commission of Congress on the subject of coal mining, said:

"We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactment of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues, and the promotion of the harmonious relations of capital and labor engaged in a great industry of the State.

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts."

It may be noted in passing that the policy of the State of Arkansas, as declared by the Supreme Court, is directly opposed to the policy of the State of Ohio as declared by its Supreme Court, where a law similar to that of the State of Arkansas was held unconstitutional, as will be hereafter shown.

On the relation which the statute should have to the purpose to be accomplished, perhaps no better statement can be found than that of Justice Harlan in *Adair vs. United States*, 208 U. S., 161, 174, heretofore quoted, but we desire, also, to call the court's attention to the language of Mr. Justice Peckham in *Welch vs. Swasey*, 214 U. S., 91, 105, where he says:

"The statutes * * * must have some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently

decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are *arbitrary and unreasonable*, and *beyond the necessities of the case*, the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler vs. Kansas*, 123 U. S., 623, 661; *Minnesota vs. Barber*, 136 U. S., 313, 320; *Jacobson vs. Massachusetts*, 197 U. S., 11, 28; *Lochner vs. New York*, 198 U. S., 45, 57; *Chicago Railway Company vs. Illinois*, 200 U. S., 561, 593."

If the statute in our case concerned itself *solely with the method of weighing the coal to determine the amount* upon which the wages of the employee depended, leaving employer and employee free to contract for *the rate of wages* and free to contract with *respect to quality of the product* which the employer desired, the facts would be like those in *McLean vs. Arkansas*, *supra*, but there is a wide difference between that case and the case at bar. The statute of Arkansas left the operator free to contract with respect to the quality of his coal. It expressly permitted the employer to reject the contents of any car of coal which did not measure up to his requirements. It was evidently in large measure by reason of the fact that this power of rejection was left in the operator that the Supreme Court upheld the Arkansas statute. The statute in our case deprives the operator of this power, and delegates to the Industrial Commission the power to determine for him the quality of the product that he must accept. Therefore the legislature of Ohio, in passing this act, ostensibly to regulate "the weighing of coal at the mines" in the interest of the employees, has invaded the rights of the employer in several respects not within the Arkansas statute. Under our law the Industrial Commission is authorized to "fix" the percentage of "slate, sulphur, rock, dirt, and other impurity" which may lawfully be loaded into and become a part of the contents of the "mine cars," and which,

when so "fixed," the operator must accept and pay for under the provisions of section 1 and section 6 of the statute, whether he wants it or not, and without regard to his market requirements. The Industrial Commission, likewise, is empowered, under the provisions of section 3, in the event an employee and his employer shall not agree upon the percentage of fine coal, to "fix" the allowable percentage of fine coal which the operator must accept and pay for. **In other words, the right of the operator to determine the quality of the product that he wishes, having due regard to his market necessities, is taken away from him and delegated to the Industrial Commission of Ohio. This is clearly an arbitrary, unwarranted and unnecessary interference by the State with the right of the coal operator to manage his own business according to his own ideas.** It belongs to that class of legislation, but goes farther than any statutes to which our attention has been called, in interfering with the right of contract. *It is paternalism carried to the extreme. It is introducing government by commission with a vengeance.*

Suppose the Commission in its wisdom fixes a standard permitting impurities to such degree and of such nature that the coal which is mined is unsalable. The operator would be forced to pay for a product which he cannot use, which he does not want, which he would not have contracted for, and which he cannot sell. The act permits this very thing.

It is well in this connection and in the subsequent discussion to bear in mind that the constitutionality of the statute is to be tested by its possibilities, as stated in *Eubank vs. Richmond*, 226 U. S., 137, 144; or, in other words, that the constitutionality of a statute depends upon what may under its terms be lawfully done. *St. Germain Irrigating Company vs. Hawthorne Ditch Co.*, 143 N. W., 124, 127; *Sterritt vs. Young*, 14 Wyo., 146; 116 Am. St. Rep., 994.

In determining the standard of impurities unavoidable under "proper mining" of coal, the Commission thrusts its own views of what constitutes proper mining upon the operator. If the operator desires to conduct his business in a

manner which may seem improper to the Commission, and to contract with his employees for more or less impurities than the Commission thinks unavoidable in proper mining he is not at liberty to do so. And this power is given to the Commission as a means to the ultimate end of protecting the employee from the fraud and oppression of his employer!

What substantial relation is there, we ask, between the end desired and the means employed? What warrant is there for thus interfering with the liberty of contract of the operator in order to promote the general welfare of the operatives?

Furthermore, the statute interferes with the liberty of contract in providing that, if the operator and operative cannot agree in fixing the allowable percentage of fine coal to be mined, the Industrial Commission shall, upon the request of the miner or his employer "fix such allowable percentage of fine coal."

It is no answer to the statement that this is an interference with the liberty of contract between the operator and operative, to say that the Commission fixed the percentage only in the event of disagreement. It is sufficient to point out that if any operations are carried on under the percentage fixed by the Commission, such operations are not pursuant to a meeting of the minds of the employer and employee, but are pursuant to terms fixed by third parties who do not represent either the employer or employee.

The statute does not state upon what basis the Commission is to fix the allowable percentage of fine coal, and the Commission will be influenced by its own ideas of how mining should be conducted. How solicitous the Commission might be of the rights of the operator to make his enterprise profitable is immaterial. It is sufficient that the conduct of the operator's business is conferred to the discretion of parties not responsible to him.

The effect, therefore, of these provisions is to delegate to the Industrial Commission the power to fix the *quality of*

the product which the operator shall take and pay for out of his own mine. We respectfully submit that this is an arbitrary and unwarranted interference with his liberty of contract and to conduct his business in a manner as seems best to him, and that there is no real and substantial relation between this deprivation of liberty of contract and the prevention of fraud and oppression upon the employees. In no other case that we are aware of has any legislature attempted to regulate the quality of the product in which any business man may deal under the pretense that it was necessary to protect the employee from fraud or oppression. That there is no real and substantial relation between the object in view and the means employed we think is clearly indicated by the facts, and also by the fact that other States have not found it necessary to adopt such harsh provisions in order to protect the operative, and that the typical form of mine-run law is that which was upheld in *McLean vs. Arkansas*, *supra*.

The important purpose of the provisions to which we object was no doubt to protect the operator himself, but this is immaterial, for in order to protect him, the legislature is not authorized to regulate the quality of his product.

Suppose the legislature should, in order to prevent fraud or theft on the part of street-car conductors, provide for Government operation of the street railways, paying certain royalties to the owners—such a law would clearly be without the bounds of the police power. The court would, in that case, say, as it did in *People vs. Lochner*, 198 U. S., 45, and *People vs. Williams*, 189 N. Y., 131, that there was no real and substantial relation between the end in view and the means employed, and that the statute was unduly oppressive, unreasonable, and arbitrary. And yet the effect of the mine-run law is substantially that of the hypothetical case. Furthermore, if the legislature can regulate the quality of the product which the operator must mine, we ask to what extent does the legislative power go? It will be but a short step to Government supervision over all the details of the coal-

mining business, and to fixing by the Government of all the terms of the contract between the employer and employee.

The operator has as clear a right to mine as much or as little fine coal and as much or as little of impurities as the owner of a department store has to choose the goods in which he proposes to deal. If it should be found that owners of department stores defrauded their employees in the sale of certain articles, it would not be competent for the legislature to delegate to a Commission the power to eliminate such products from those in which the owner might deal. Yet, if the mine-run law is sustained, laws of the character supposed would also have to be sustained. We would then have the regulation of all private business by Government-appointed commissions, all acting under the assumption that the prevention of fraud on the employees necessitated such novel methods. Certainly, it is common knowledge that the prevention of fraud does not require such extreme measures. We, therefore, submit that the mine-run law does not conform to the tests laid down in the police-power cases cited above, and that it interferes with the rights of the operators which are guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The effect of such legislation is well characterized by the Supreme Court of California, in 112 California, 468, as one of those "experimental laws none the less dangerous because well meant."

The danger of gradual inroads upon the protection afforded by the Fourteenth Amendment to the Constitution of the United States is well pointed out by Mr. Justice Brewer in *Railroad Co. vs. Ellis*, 165 U. S., 150, 153, 154:

"It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by

Mr. Justice Bradley in *Boyd vs. United States*, 116 U. S., 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principis*.'

This danger is emphasized by the Court of Appeals, speaking by Justice O'Brien, in *People vs. Williams*, 189 N. Y., 131, 135:

"The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort, and health of the community, and that a wide range in the exercise of the police power of the State should be conceded, I do not deny; but, when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked, to protest against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body."

It will not be contended that the operator of coal mines belongs to that "dependent class" entitled to be protected by the State. Neither can it be seriously argued that the power vested in the Industrial Commission to fix the maxi-

imum percentages of impurities and the maximum percentages of fine coal has (to use the language of Justice Peckham in *Welch vs. Swasey*, 214 U. S., 105) any "real substantial relation" to the methods of measuring the compensation of the *employee*, and thus safeguarding *his* interests.

It is a matter of common knowledge that fine coal sells for a lesser price than lump or coarse coal. Also, it is well understood that not only do impurities such as rock, slate, dirt, etc., improperly belong in the coal, but they seriously detract from the burning qualities of the coal itself with which they are intimately mixed. It is apparent, therefore, that this part of the act which relates to and confers on the Industrial Commission the power to "fix" the percentage of fine coal and the percentage of impurities was enacted for the *supposed* protection and benefit of the operator. Whether in fact in view of the political complexion of the Industrial Commission, and the large number of votes possessed by miners, and the few votes possessed by operators, it would or would not accomplish its purpose against the abuses of the "mine-run" system, we need not discuss. The constitutionality of the law is not to be determined by its supposed advantages or disadvantages. If a man's constitutional rights are invaded he may complain, even though the legislative purpose in making the invasion was apparently to confer a benefit.

R. R. Co. vs. McGuire, 219 U. S., 549.

The law therefore, in depriving the operator of the power and conferring it upon the Industrial Commission to determine for him the "quality" of the product which his employees may load and deliver to him, constitutes an unwarranted and arbitrary interference with the employer's right to determine for himself what quality of coal he will produce, and deprives him of his right to contract therefor. These provisions are wholly unnecessary for the protection of the employee, and bear no substantial relation to the object there sought.

The parts of the law with respect to weighing coal are so connected with the parts that are unconstitutional that they cannot be separated. The invalidity of these provisions, therefore, destroys the whole law.

Cooley on Constitutional Limitations (third ed.), page 178.

Allen *vs.* Louisiana, 103 U. S., 80, 83.

Sprague *et al. vs.* Thompson, 118 U. S., 90.

International Textbook Co. *vs.* Pigg, 217 U. S., 91, 113.

Treasurer *vs.* Bank, 47 O. S., 503.

State of Ohio *ex rel. vs.* Commissioners, 5 O. S., 497.

Bank *vs.* Hines, 3 O. S., 1, 34.

Gibbons *vs.* Cath. Inst. Cin., 34 O. S., 289.

In Textbook Co. *vs.* Pigg, *supra*, the syllabus reads:

"Where a statute is unconstitutional in part the whole statute must be deemed invalid, except as to such parts as are so disconnected with the general scope that they can be separately enforced."

In State of Ohio *vs.* Commissioners, *supra*, the last section of the syllabus reads:

"As a general rule, one part of an act will not be held unconstitutional and another part constitutional unless the respective parts are independent of each other. But in this case the provisions of the first and fifth sections are intimately connected. They were submitted to the electors and voted on as a whole; the fifth section would induce the adoption or rejection of the first. In such a case, they must stand or fall together."

That the legislature would not have passed a "mine-run law" alone and have subjected the operator to the abuses of such a system not only appears from the text of the law itself, but it is further made apparent from the report of

the Mine Commission to the Governor of Ohio. This Commission was appointed by a joint resolution of the Ohio Legislature (103 Ohio Laws, 981). This resolution contained the following preamble:

"Whereas, there is pending before the General Assembly a bill known as Senate Bill No. 23, relating to the method of weighing coal at the mines throughout the State; and

"Whereas, this subject is of vital importance to the operators and miners, and affects the entire mining industry of the State; and

"Whereas, because of the public nature of the mining industry the interests of the citizens of the State are directly concerned; and

"Whereas, it is necessary for the General Assembly to have full and accurate information on the subject-matter involved, in order to enact laws which will adequately protect the interests of the public, operators, and miners; therefore be it *resolved*," etc.

(Here follows the authority to the Governor of the State to appoint a Commission of five members, and giving them full power to investigate the subject referred to in the preamble, and "make its full report with whatever recommendations it may see fit to make to the Governor on or before December 1, 1913.")

The Commission was appointed and duly reported to the Governor. This report shows a very full investigation of the subject. The coal business had theretofore been conducted in Ohio almost exclusively on the screen-coal basis, and the question of changing the basis to mine-run basis was the subject of very careful investigation. In this report the Commission stated in great detail the various reasons why the miners want the mine-run instead of screen-coal basis. They also state in considerable detail the reasons why the operators object to the change. They comment upon and reach the conclusion that the mine-run basis has

a tendency to increase the amount of fine coal produced, and also increase the amount of impurities, and that the operator should be protected against the evils of such a system by some proper regulations.

On page 58 of the report they say:

"Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface unless some way were found to protect the operator from the carelessness or indifference of the miner."

On page 59 of the report they say:

"When we turn to a consideration of the mine-run system of measuring the amount of payment, which is the system employed in many States, and which is the system the miners desire to have adopted by law in Ohio, we encounter the operators' objection to such a system based on the notion that there would be a great increase in the amount of impurities and fine coal sent out of the mine under such a system. We are inclined to give full weight to their objections in so far as they relate to a probable increase in the amount of impurities, the experience of other States, especially those of Illinois and Arkansas, showing these objections to be real. If the mine-run system of payment is to be adopted by law it should apply only to clean coal, *i. e.*, coal cleaned in such a way that the operator is able to market it. * * *

"We also believe that there would be some increase in the amount of fine coal. * * *

"As to whether the adoption of the mine-run system would cause miners to shoot their coal harder, even when the coal was undercut, and thus would result in an increase in the amount of fine coal, we are unable to determine in the light of conflicting testimony which we have on this point. It would appear to be the part of wisdom to provide safeguards for the mine owners which would operate in case their fears in regard to this matter are realized, but the restrictions on the miners need not be so

carefully defined nor enforced by the same penalties as in the case of the impurities. Accompanying this report will be found a draft of several suggested bills, which cover the recommendations made by this Commission."

Attached to said report were five bills referred to in the above paragraph. Bill No. 5 was passed by the legislature and is the bill that we have here under discussion.

THIS ACT IS UNCONSTITUTIONAL UNDER THE CONSTITUTION OF THE STATE OF OHIO.

In the case *In re Preston*, 63 O. S., 428, the Supreme Court of Ohio had before it a mine-run law which contained the following provision:

"It shall be unlawful for any mine owner, lessee, or operator of coal mines in this State, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio."

The petitioner had been prosecuted for a violation of the act. The court held the act unconstitutional for the reasons stated in the following quotation:

"It purpose is to terminate the rights heretofore universally recognized in this State, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the State expressly disclaim any authority in the legislature to determine the price to be paid for

mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal, miners have become entitled to receive and operators have become bound to make, compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. * * * It is suggested as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. * * *

"This act may be invalid for other reasons, but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make compensation according to the value of the service rendered and received."

The police power of the State of Ohio, as defined by the Supreme Court of the State, in the case cited, does not, therefore, extend to the passage of an act such as was there considered.

This case has not been overruled or qualified in any respect, and the present law, considered simply as a "mine-run" law, is, therefore, not within the police power of the State, unless the amendments to the Constitution require a different conclusion.

That the Federal courts are bound by the construction which the highest State court places upon the constitution of its own State is well settled.

Merchants Bank vs. Pennsylvania, 167 U. S., 461.

In *Haire vs. Rice*, 204 U. S., 291, 301, Justice Moody said:

"It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive; and plainly we have no power to review it."

See also

Express Company vs. Ohio, 165 U. S., 194, 219.

Oakes vs. Mase, 165 U. S., 363.

Debitulia vs. Lehigh Coal Co., 174 Fed., 886, 888.

It is the settled law, therefore, that, subject to the limitations imposed by the Federal Constitution, the public policy of each State and the extent to which its police powers may be exercised is a matter for the determination of the State courts.

There remains for consideration, therefore, the question whether since the decision in the 63 O. S. the constitution of the State has been amended so as to permit legislation of this character.

Since that decision article 2 of the constitution has been amended by adding, among other sections, section 34, providing that:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

and section 36, providing that:

"Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the State, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the State, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

Does the law come within the power conferred upon the legislature by the amendments quoted? As this is not a law with respect to hours of labor or minimum wage, nor relating to the comfort, health, or safety of employees, it must, in order to come within the provisions of section 34, be a law for the "general welfare" of employees. Without this amendment the legislature could, under the police power, pass laws for the "general welfare" of employees, and this amendment adds no new power unless the last clause, in providing that no other provision of the constitution shall impair or limit the power, has that effect. This latter clause, however, does not aid in determining what is the extent of the power conferred on the legislature in permitting it to pass laws for the welfare of employees; it merely prohibits any other section of the constitution from impairing the power thus granted and has no affirmative or positive effect.

The 63 O. S. deals with a statute similar to the Arkansas mine-run law heretofore commented on and reported in 81 Arkansas and in 211 U. S., 539, and held valid. The policy of Ohio was, therefore, prior to the amendment of the Ohio constitution, directly opposite to that of Arkansas. It does not seem to us that the amendments have changed the law

or reversed the policy of the State as settled by the decisions of the Supreme Court of Ohio.

Even if we are wrong in this, however, the present law cannot be sustained.

This amendment, so far as pertinent here, can only be claimed to justify this law as constitutional on the ground that it provides for the "general welfare of all employees." The amendment does not permit the passage of a law which contains restrictions upon the liberty of employers. For example, it cannot be argued that if the legislature should be of the opinion that it would be for the welfare of employees to own their own homes, and to have them fitted out in the most modern and approved manner, that it could under this amendment pass a law providing that the employers must provide their employees with such homes. The amendment did not grant to the legislature any such power. It gives to the legislature the power to pass only such laws as are ordinarily and customarily considered to be for the welfare of employees and not such laws as pretend to come within this power, but are in reality an arbitrary interference with the rights of others.

Suppose the legislature should be of the opinion that the "general welfare" of mine employees would be promoted by State operation of the coal mines, and suppose it should pass a law providing that a State commission should operate the mines and pay a certain royalty to the owners, could it be reasonably argued that such a power is comprehended in the terms of section 34? And yet that would be the result if it be contended that section 34 invests the legislature with absolutely unlimited power to pass any law it sees fit which, in its opinion, will promote the "general welfare" of employees. It would be absurd to maintain that such power was intended to be conferred.

We are not now arguing that this section is limited by any other section of the constitution. We are merely trying to ascertain what extent of power the framers of *this amend-*

ment intended to confer upon the legislature, and we contend that the section does not confer power to pass a law intended for the general welfare of employees which has annexed to it such features as amount to an arbitrary interference with the rights of the employer and which are not reasonably necessary to promote the general welfare of employees. The law under consideration is a law of the latter class. Assuming that it is intended to prevent fraud on employees, it has annexed to it provisions which operate as an arbitrary interference with the right of contract of operators and which bear no substantial relation to the welfare of employees.

In another part of this brief we point out in detail the arbitrariness and unreasonableness of these provisions, and we show that they are not reasonably necessary to secure the end desired. We cannot believe that this amendment confers power to interfere to such an arbitrary and unreasonable extent with the right of contract of operators.

The courts will look at the real effect, object, and operation of the law and will not be deceived by the disguise in which the law is framed. Under the guise of this amendment the legislature is not justified in passing laws causing arbitrary and unreasonable interference with property rights any more than it has under the police power.

The same considerations apply to the amendment in section 36, above quoted, and in a greater degree, because there is no clause added stating that the provisions of section 36 are not limited by any other provisions of the constitution.

Section 36, in permitting the legislature to provide for the regulation of mining and weighing coal, does not grant the power to take from the coal operators their property nor the operation of the same for the benefit of their employees. In spite of this amendment the Bill of Rights still protects the operators of coal mines as well as it protects any other class in the community; it is as broad as section 1 of the 14th amendment.

Adler vs. Whitbeck, 44 O. S., 539, 568-569.

The operators' mines and the right to manage their own business cannot be taken from them with any more justification than the property of any other individuals.

Section 19 of article 1 of the constitution of Ohio requires that compensation be made in all cases where private property is taken for public use. If the State desires to regulate the weighing and mining of coal in the interest of the public in such a way as to interfere with the right of the operator to manage his own business, it can do so only by paying the owner therefor. Section 36 plainly contemplates that if action should be taken by the State authorities that it would be taken by constitutional methods and with due regard to the rights of the present owners of such property.

Section 36 deals largely, if not wholly, with conservation. If the present act has for its object the conservation of natural resources, it is plainly unconstitutional. The State may perhaps, in the furtherance of a broad public policy, by proper condemnation proceedings, acquire all the coal property in the State, but it may not, *while such property is privately held*, regulate the operation thereof in the interest of the public or *require the owners to operate* it in the interest of the public without some provision for due compensation. Such action constitutes taking of property without due process of law.

Review of Opinion of Court Below.

The court below in its opinion used the following language:

"Laws enacted in its appropriate exercise (police powers) have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (Camfield *vs.* U. S., 167 U. S., 518, 524), to promote harmonious relations between capital and labor (McLean *vs.* U. S., 211 U. S., 539, 549, 550), to avert strikes, violence and bloodshed (Peel Splint Coal Co. *vs.* West Virginia, 36 W. Va., 802; Knoxville Iron

Co. vs. Harbison, 183 U. S., 13, 21), to provide for the safety and health of miners (*Freund, Police Power*, sec. 115; *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S., 531), and to regulate mines and mining and to conserve and avoid the waste of fuel, minerals and other natural resources. (*Barrett vs. Indiana*, 229 U. S., 26, 29; *State vs. Ohio Oil Co.*, 150 Ind., 21; *Ohio Oil Co. vs. Indiana*, 177 U. S., 190; *Hudson Water Co. vs. McCarter*, 209 U. S., 349; *Wilmington Star Mining Co. vs. Fulton*, 205 U. S., 60.)

In *Hudson Water Co. vs. McCarter*, 209 U. S., 349, 355, Justice Holmes said:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would fail. To set such a limit would need compensation and the power of eminent domain.

"It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point."

If we bear in mind the observations of Justice Holmes, we will see how inapplicable to the case we now have under

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discussion all the cases are that were cited by the district court in the quotation above.

The case of *Canfield vs. U. S.*, 167 U. S., 518, 524, was concerned with the right of Congress to legislate with respect to the public lands. On pages 522 to 524 Justice Brown discussed at some length the question of spite fences between adjoining proprietors. The case of *McLean vs. U. S.*, 211 U. S., 539, 549, 550, is cited as an authority on the power of the State to pass laws promoting harmonious relations between capital and labor. The Supreme Court of Arkansas (81 Ark., 304) sustained that statute, and held it to be within the police power of the State on the express ground that it was to prevent fraud by employers upon employees in measuring the product of their labor upon which the employees' wages depended. The court said:

"* * * The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal 'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'

"The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded."

It is true that Justice Day, in delivering the opinion of the Supreme Court in 211 U. S., 539, 550, used the following language:

"We are unable to say, in the light of the conditions shown in the public inquiry referred to and the necessity for such laws evidenced in the enactment of the legislation of various States that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relation of capital and labor engaged in a great industry in the State."

An examination of the opinion shows that the real ground thereof was the same as that of the Supreme Court of Arkansas, to wit, the protection of dependent persons against fraud in the manner of determining the wages they had earned. *Peel Splint Coal Company vs. West Virginia*, 36 W. Va., 802, is cited as an authority for the State to pass laws to avert "strikes, violence, and bloodshed," and there is language in this opinion to that effect.

While we do not quarrel with the judgment rendered, the logic of the case would warrant the State in interfering in each and every negotiation between employer and employee, and fixing and regulating the wages to be paid. If a State may lawfully fix the rate of wages that an employer must pay, it may lawfully fix the rate of wages that the employee must work for (*Adair vs. U. S.*, 208 U. S., 161).

Knoxville Iron Co. vs. Harbison, 183 U. S., 13, 21, is cited to the same effect. This case deals with a statute requiring employers to redeem in cash, store orders issued to employees in payment of wages, and comes within the principles settled by *Holden vs. Hardy*.

Freund on Police Powers, section 115, and *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S., 531, are cited by the lower court as authority for the proposition that the legislature may provide for the *safety and health of miners*. These principles are not *peculiar to miners*. They inhere in any business which is dangerous. For instance, laws have been held constitutional which require cogs, punches, drills, and other dangerous machinery to be covered by such safety devices as will protect employees. In rooms devoted to manufacturing the accumulated dust from the work performed may be required to be removed; buildings devoted to tene-ment purposes where people are crowded in their sleeping and living accommodations are lawfully made subject to such regulation as will secure to the occupants sunlight and air; fire escapes upon buildings of certain height and various other things which might be cited pertaining to every kind

of business are proper subjects of police regulation by the State. When we come to mining, it is simply the same principles applied to a like situation. For instance, the miner is removed from the surface of the ground and must be supplied with pure air by artificial circulation; his ingress and egress to the working places in the mines must be by entries driven from the surface, the regulation of the size and width of these entries is therefore proper. Because the legislature may require a dangerous piece of machinery to be covered in the interest of the safety of the employee, it may not prescribe the quality of the product that the employer shall hire the employee to produce, or the quantity that he shall produce or the wages he shall be paid. Neither has anybody ever supposed that the recognized power of the State to require proper ventilation of a dusty room devoted to manufacturing or the proper ventilation of tenement buildings, that from that power arises also the power to determine for the manufacturer, in his contract with his employees, that he shall make one kind of goods rather than another, nor, in respect to the tenement house, how much rent shall be charged.

The further cases cited by the lower court may be dismissed with a brief comment. *Barrock vs. Indiana*, 229 U. S., 26, 29, prescribed the width of entries in coal mines. We have already commented on that subject. 150 Ind., 21, and 177 U. S., 190, relate to natural gas. *Hudson Water Co. vs. McCarter*, 209 U. S., 349, relates to the waters of a State which the riparian proprietor proposed to divert to another State. These cases, together with *Wilmington Star Mining Co. vs. Fulton*, 205 U. S., 60, are cited by the lower court as instances of the valid exercise of the police powers of the State to *conserve and avoid the wasting of natural resources*.

The difference between property rights in timber, coal, and other minerals and property rights in such things as gas, oil, and water flowing in streams is pointed out in these

cases and also in Oklahoma *vs.* Gas Co., 221 U. S., 229, and Haskel *vs.* Gas Co., 224 U. S., 217. In 221 U. S., 251-2 it was conceded that property rights in such property as timber, coal, iron, etc., were *absolute*.

The case of Wilmington Star Mining Co. *vs.* Fulton, was a personal injury case. The statute required the appointment of licensed engineers and mine managers. This comes within the observation heretofore made with respect to manufacturing plants. Every State in the Union, so far as I know, has laws requiring the employment of *licensed engineers to operate steam boiler plants*. Wherever there is danger, the employer can be required to employ as managers or superintendents only such persons as have demonstrated by proper examination that they have sufficient experience and skill to do the work safely. To push the observation a point further, the power of the State to require the employment only of licensed engineers would not authorize the State to determine for an employer, if an owner and operator of a blast furnace, that he should make Bessemer pig iron instead of foundry pig iron, or that the iron produced by him should contain one per cent of carbon instead of one-half of one per cent.

The regulation of the business of the employer to the extent necessary to conserve the health and safety of employees is justified, and is within the well-recognized police powers, but to go beyond that and arbitrarily interfere with the business of the employer by dictating what his product shall be or, what amounts to the same thing, committing it to the judgment of a State commission, is something that has never been recognized and is beyond any case in the books.

It may be contended (and perhaps that was the purpose of the court below in citing the above cases) that these were intended simply as *illustrations* of the proper exercise of the police power. If this be the limitation to be placed upon

that part of the opinion, I have no quarrel with it, provided each case is *confined to its own facts*.

That they were thus intended as illustrations is rather emphasized by the last paragraph of the opinion, where it would seem that the court based its judgment upon the ground that the Ohio statute is ruled by "*McLean vs. Arkansas*, and is well within *German Alliance Ins. Co. vs. Lewis*, decided April 20, 1914."

The opinion of the district court does not definitely fix the basis of the decision. It is quite evident the court was of the opinion that the mining business, under section 36, article 2, of the Ohio Constitution as amended, or because held (in the cases cited) *subject to legislative regulation in certain respects, had become affected with a public interest and was subject to regulation in all respects within the principles laid down in German Alliance Ins. Co. vs. Lewis*. Carried to its logical result, this would authorize the legislature to fix the price of coal, in the same way as they fixed the price of insurance in the case cited.

There is language in the opinion indicating ideas favorable to *conservation of natural resources*, and yet it is apparent that those cases which dealt with oil and gas have no application to such property as timber, coal, or other minerals. The latter are *subject to absolute private ownership and may not be taken from the owner for the public benefit without compensation*. The coal business is distinctly a private business. The owner of one hundred acres of coal land has the same title to the coal as to the land. He has the same right to use his private property according to his own ideas as the owner of an hundred acres of agricultural or timber land. Agricultural land wears out, if not properly fertilized, just as effectively as minerals become exhausted by mining operations.

Again, the law in question does not affect the relations of the coal operator toward the public. It deals with the private internal management of the business—the relations

between master and servant. The legislature can no more control the *relations* between employers and employees in the *mining of coal* than like relations in *any other business*.

It is not to be overlooked that in the late case of *Insurance Company vs. Lewis* the justices of the Supreme Court disagreed as to the scope and effect of that decision. Justice Lamar, dissenting, contended that the majority opinion meant the breaking down of all protection of the Fourteenth Amendment of the Constitution of the United States, in that it would destroy all rights of private property. Evidently he and the Chief Justice and Justice Van Devanter had urged that view with great force, but the majority of the court distinctly repudiate any such intention. Thus Justice McKenna said:

"But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern leave our discussion to take care of itself against such misunderstandings or deductions. The principle we apply is definite and old and is, as we have pointed out illustrating examples, and both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become clothed with a public interest and therefore subject to be controlled by the public for the common good."

In further distinguishing a business like insurance from ordinary business, Justice McKenna said:

"And so with the regulation of the business of insurance; they have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison with them in relation to the power of government, how can it be said that fixing the prices of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural

one when it can be denied to individuals and permitted to corporations? How can it be said to have the profit of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rights denied and a limitation on its risks imposed? Are not such regulations restrictions upon the exercise of personal right—asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?"

It is apparent, therefore, that the coal business, which consists simply in separating one species of property—mineral coal—from the balance of the property and selling it to the public, is distinctly a private business in which any owner of such property may lawfully engage. His business, like any other business involving danger, is subject to regulation under the police power in respect to the safety and health of the persons engaged in the business, and laws may be passed that have some substantial and necessary relation to the health and safety of employees in mines. Laws also may be passed which will protect employees against fraud in the payment of their wages. The exercise of the police power under any of these heads is not peculiar to mining business, but reaches out into every business whose operation involves danger to the health and safety of employees.

An examination of the present law, however, shows that it has no relation whatever to the health or the safety of the employees. It is concerned solely with the payment of their wages, and had it stopped with appropriate provisions upon that subject it would have been within the principles of *McLean vs. Arkansas*, but there is no relation between the protection of the miners in the payment of their wages and the fixing of the per cent of impurities and per cent of fine coal. The coal operator must be left free, like any other person engaging in business, to determine what he can produce and market. There is no warrant for interfering with and

abridging the right of contract in the respects attempted by the Ohio law.

The court below, in respect to the contention by plaintiff that the penalties prescribed by section 6 of the act were so excessive as to deny to the operator the equal protection of the law, and to the contention that the act was penal in its nature, said:

"If the penalties are a separate part of the act, which we need not now determine, the objection to it on account of them is premature. *Flint vs. Stone Tracey Company*, 220 U. S., 177. If they are not thus separate, they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer wishing to test the law will risk the possibility of repeated violations of the Commission's orders."

Section 6 denounces the penalty from the act of the employer and it is in no manner dependent upon the "Commission's orders." Under this law each and every car of coal which is passed over a screen or other device whereby the contents of the car is reduced before calculating the amount to be paid the miner is a misdemeanor rendering the operator liable to a minimum fine of \$300 and maximum of \$600, and the bill in this case shows that at the minimum rate the fines that would be assessed against the plaintiff in this case would be over \$800,000 per day.

The proposition that the operator might disobey the law once, that is, by passing one car over a screen contrary to the law, and then, being a "prudent" person, will obey the law until its constitutionality can be determined, was conclusively answered by the Supreme Court of the United States in *Ex Parte Young*, 209 U. S., 123, 145-147, 163. Quoting therefrom, we find the principle announced to be as follows:

"It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and

if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' (Quotation from Mr. Justice Brewer in *Cotting vs. Kansas City Stock Yards Company*.) The question was not decided in that case, as it went off on another ground. * * *

"It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

(Page 163:)

"It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

The law is distinctly penal in character. If the penalties of section 6 are stricken out there is no way to enforce obe-

dience. The State would be powerless. The case differs from the Wilcox and other cases involving rates of public service corporations which are capable of enforcement by means other than the penalties. The miners would have no standing in court as individuals to effect any practical result. It is evident, therefore, that the law would not have been passed without the penalty clause.

The point made, that in the Commission's report it was stated that payment of wages on the mine-run basis would have a tendency to make the miner send out all the fine coal, might sustain the mine-run payment feature of the law. But the Ohio law deals with matters that bear no relation to the wages of employees, or to their safety, to wit, the determination by the Industrial Commission for the operator of the amount of impurities that he shall accept and pay for, thus violating the inherent right of the operator to contract for the production and produce coal that will fill his market requirements.

In the report of the Ohio Coal Commission, referred to in the opinion of the lower court (pages 54 and 55), it was said:

"The miners say that they do not demand pay for dirt, at least for that amount of dirt which could have been eliminated by careful loading and that if the operators desire to dump the mine car and take out the dirt before the coal is weighed, they are willing that this be done.

"The original Green bill, introduced at the last session of the legislature, provided for weighing the coal in the mine car. This would have made it impossible to remove any considerable amount of the dirt before determining the pay of the miners. The unfairness to the operators and the possible disadvantageous effect upon the consumers of coal were so apparent that the bill in the course of its discussion in the two houses was amended with the consent of the author so as not to require payment in the mine car but to allow the impurities to be removed before the coal was weighed.

"The question, however, arises, how far is it practicable to secure clean coal by such a method? How is it possible to clean the coal on the tippie before it is weighed and before the miner is credited with the weight of his car if he is to be paid for his work on the mine-run basis? If it were possible to do this and credit each miner with the total product of clean coal, this would be an equitable solution of the difficulty, at least so far as the question of clean coal enters into the controversy. Neither the miners nor the operators, however, have been able to show us how this is to be done."

On page 51 of said report the Commission said:

"All parties agree that the place to remove these impurities is in the mine at the working places."

If this report is to be relied upon as expressive of common experience, it is quite apparent that the only place to properly clean coal is in the mine where it is produced. Common sense also would tell us the same thing. Impurities in coal are slate and dirt, which usually exist in bands. The majority of them must be removed at the time the coal is being mined. It will be too late to remove the fine dirt after once mixed with the coal. To deprive the operator of the right of rejecting coal which does not come up to his market requirements and delegating the power to a State commission to determine for him what he shall have, is an unlawful interference with his right to manage his own business.

The State of Ohio has legislation requiring the removal of dust from mines, punishing non-observance by suitable penalties.

Judge Shauck, speaking for the Supreme Court of Ohio (*In re Preston*, 63 O. S., 428, 439), referring to the suggestion that frauds might be perpetrated in screening and weighing coal, said:

"That if such danger exists it may well justify appropriate legislation for the prevention of such fraud."

In *Oklahoma vs. Kansas Natural Gas Company*, 221 U. S., 229, 251, Justice McKenna said:

"If the right of conservation be as complete as contended for it could be secured by simple prohibitions or penalties."

It is a wholly unwarranted assumption, in view of the state of the law in Ohio, that this particular law, the *title to which is plain* and the language of which is plain, was designed to supplement the penal laws and promote the safety of mining (*Dart vs. Bagley*, 110 Mo., 42, 51; *Lessee Burgett vs. Burgett*, 1 O., 469, 481; *State vs. Pugh*, 43 O. S., 113). In view of the well-recognized increase in the dangers of mining, when coal is produced on the mine-run basis, the claim is not only far-fetched but is contrary to all *human experience*. Even, however, if this were true, it relates only to the "mine-run feature." The legislature may not, in enacting a law for weighing coal before screening, incorporate with it provisions that bear no "substantial and necessary relation to the end in view." The provision of the law delegating to the Industrial Commission the right to fix the impurities in the coal has no relation whatever to the mine-run feature.

The observation is made that the law does not prohibit employment of miners by the day or by the week. This same suggestion was made in the *McLean* case. This overlooks the fact that every business might theoretically be conducted on a basis which, practically, has been demonstrated to be impossible. For instance, hand labor has in many occupations become obsolete because of inventions of machines. The affidavit in this case shows that the employees in Ohio are unionized, that their bargains are collective bargains, and that all men who mine or load coal are paid by the weight and not by the day. To attempt to pay men in any other way, in view of the nature of the business and the impracti-

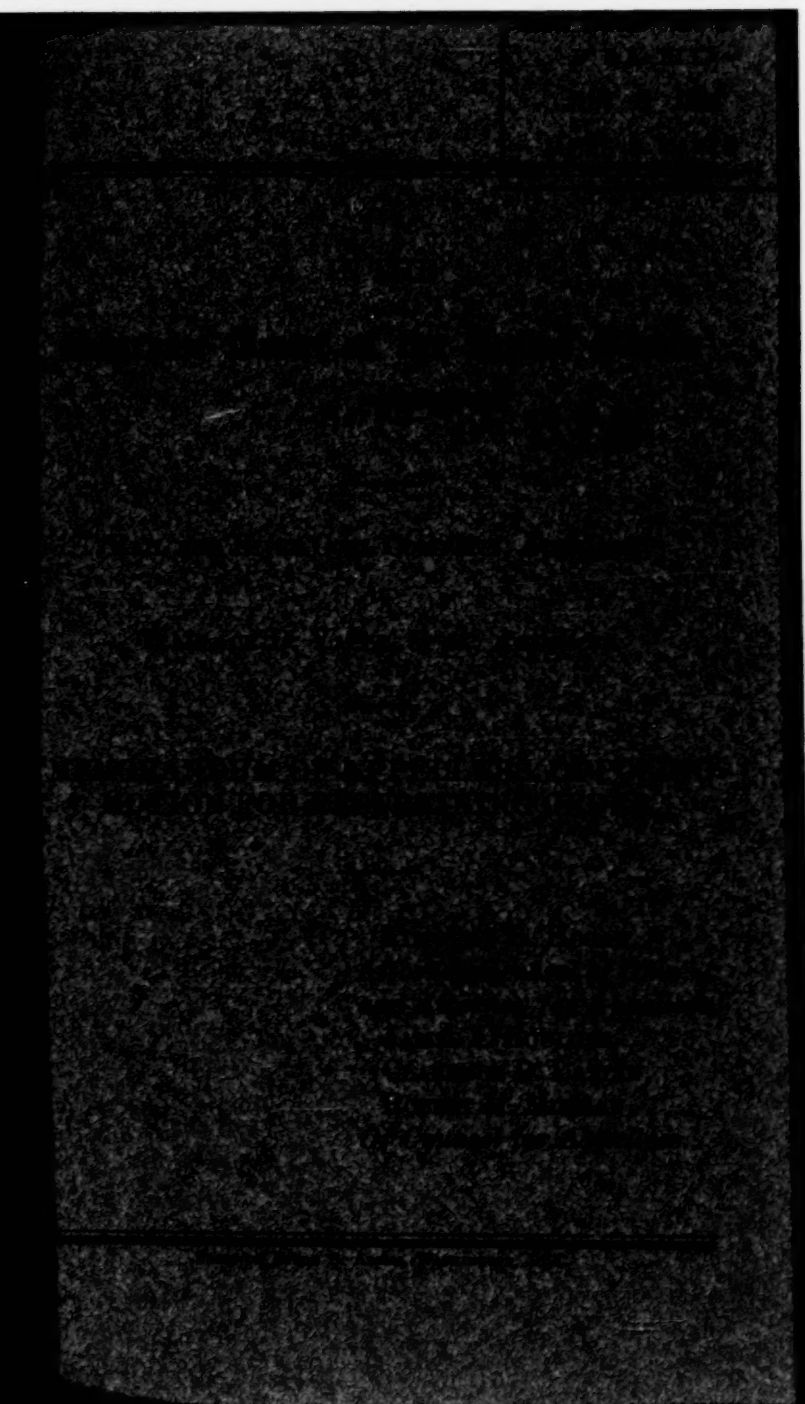
cability of its supervision, would quickly deprive any operator into bankruptcy.

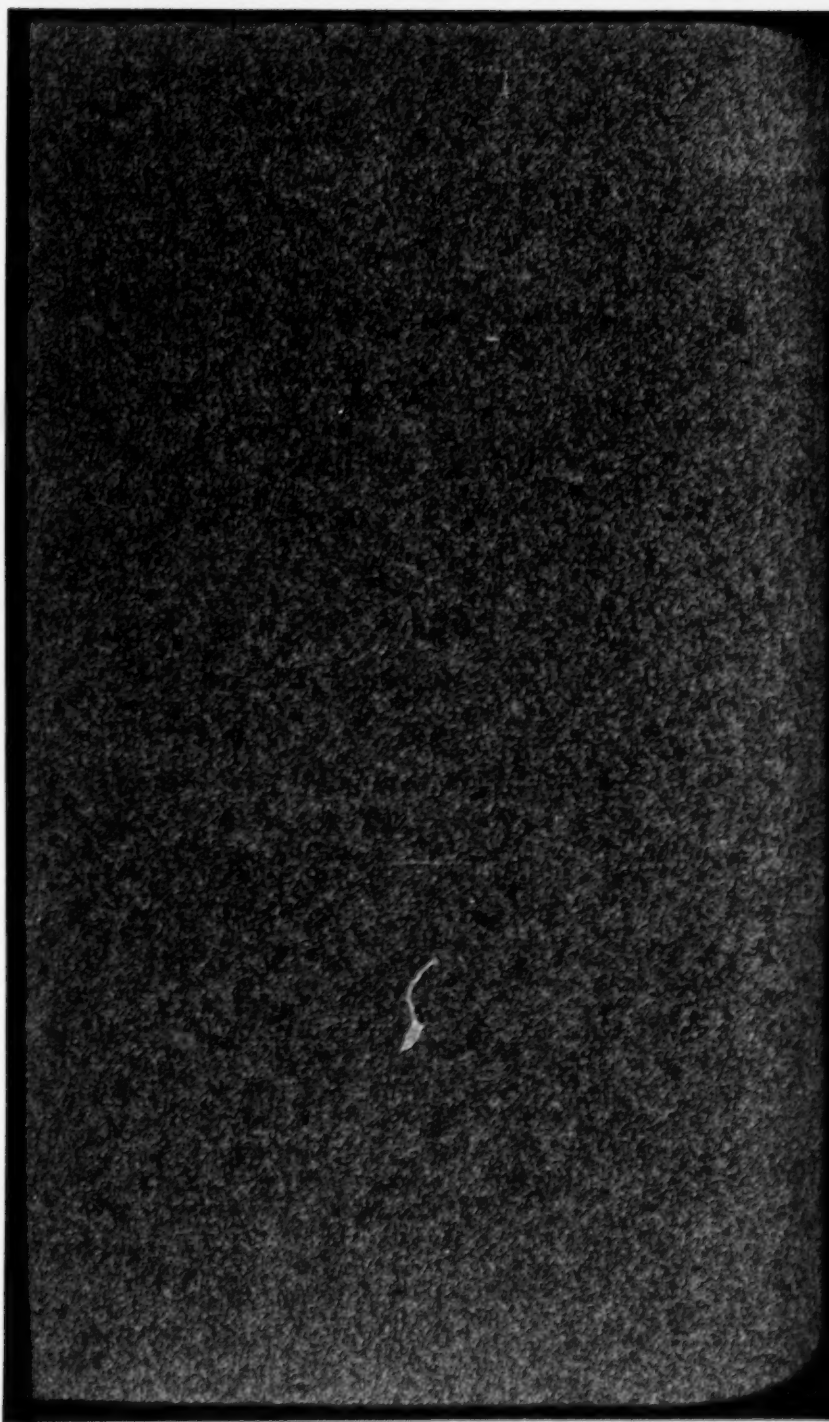
While, therefore, theoretically it may be possible to contract by the day, or by the week, practically it is not.

Very respectfully submitted,

A. C. DUSTIN.

[25658]





IN THE
Supreme Court of the United States
No. *1104*

RAIL AND RIVER COAL COMPANY, *Appellant*,

v.

WALLACE D. YAPLE, *et al.*, *Appellees*.

MEMORANDUM OF APPELLEES, OPPOSING
MOTION FOR RESTRAINING ORDER.

The general scope and purpose of the Ohio law the enforcement of which is sought to be suspended is the same as that of the Arkansas law, sustained in *McLean v. Arkansas*, 211 U. S., 539; that is, both laws alike seek to prevent the compensation of miners upon a weight basis other than according to what is known as the "run of the mine"; *i. e.*, the total weight of the contents of the mine car.

If there is any element of novelty in the instant case and if it is not ruled absolutely by *McLean v.*

Arkansas, such a result follows from the provisions of Sections 2 and 3 of the Ohio law. That is, unless it can be shown that the presence of these provisions in the Ohio law constitutes a further and unwarranted invasion of the liberty of contract, this case is ruled by the Arkansas case and there is no merit in the application for a temporary restraining order.

Our contentions with respect to the provisions of Sections 2 and 3 of the Ohio law are as follows:

1. They constitute appropriate and necessary incidents to the main object of the law.
2. Their effect cannot be complained of by the appellant and those whom it represents.

Section 2 of the law provides for a determination by the Industrial Commission of Ohio of the percentage of impurities *unavoidable* in the proper mining or loading of the contents of mine cars of coal in the several operating mines in the State of Ohio. The purpose of this provision will be adequately disclosed to the Court by a perusal of pages 51 to 58, inclusive, of the Report of the Ohio Coal Mining Commission, *a copy of which is filed herewith*, and further by reading the Commission's second conclusion and recommendation at page 59 thereof.

The proceedings and recommendations of the Commission conclusively show that in the mining fields in which the ordinary mine run system of compensation obtains its most unfortunate consequence is the incidental production of an undue proportion of impurities. The evidence before the Commission related particularly to the experience of Indiana,

Illinois and *Arkansas*, under the mine run system, and it is well established by that evidence that where operators and miners are left free to contract respecting the basis of rejection on account of impurities, the evil is not obviated. The only way in which the incidental detriment of the mine run system can be met is by some such means as is found embodied in Section 2 of the Ohio Act, *i. e.*, a legislative requirement that no impurities in excess of the *unavoidable minimum* be allowed to be mined. Coupled with the imposition upon an administrative tribunal of the duty to ascertain by impartial investigation what is for each mine the unavoidable percentage. If there is any other way in which the desired result can be obtained, it has not been suggested in previous arguments in this case.

We submit that if a State has the power to limit the right of private contract so as to require all agreements for compensation of miners based upon the weight of the product of the mine to be made according to the total weight of the contents of the car, it also possesses, as an incident to this right, the power further to limit (in a purely technical sense) the right of private contract so as effectively to cope with the evils otherwise incident to such legislation. Especially does this follow, when the experience of States lacking such incidental legislation demonstrates that the evils inevitably occur.

The evils intended to be remedied are real and substantial. The report of the Commission shows this, and we feel that we need not expend space upon this proposition.

We contend that the plaintiff in this case, and those whom it represents, viz.: the coal operators, have no just cause for complaint on constitutional grounds against Section 2 of the Act. It has been said in argument that the effect of this section is to deprive the operator of the right to determine the quality of the coal which he desires to produce in his mine so as to fit the conditions of his market. We submit that the section has no such effect. The claim of appellants here is based upon an evident misconception of the function of the Industrial Commission under Section 2. The Commission is not to establish an arbitrary standard of purity; it is to ascertain the unavoidable percentage of impurities which may be produced by proper mining therein. As well said by the Court below:

“It must be presumed that the Industrial Commission will perform its official *duty* and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities except such as is *unavoidable*. *The operator, if given the unrestricted right of contract could do no more.*”

In other words, the operator can not complain that the Act deprives him of the right to protect himself against an excess of impurities by his own contracts, because it is the duty of the Commission to extend to him all protection which he could possibly secure for himself. On the other hand, the operators could not be heard to complain that the law prohibits them from so contracting as to permit the mining of coal

of a lower grade of purity than that prescribed by the standard of the Act, for to do so would be to invoke the protection of the Constitution for the perpetration of a fraud upon the public, viz.: the production of unnecessarily impure coal.

Furthermore, if the appellant and those whom it represents *fear* that the Commission's action will not go to the full extent required for their protection, *i. e.*, will not fix the minimum at what is *unavoidable*, such fears can not be made the ground of complaint under the Constitution; first, because, as pointed out by the Court below, "it must be presumed that the Industrial Commission will perform its official duty," and, second, as also pointed out by the lower Court, because "if dissatisfied with the Commission's order * * * he (the operator) may petition for and obtain a hearing before the Commission * * *, and may thereafter have a speedy review of its action by the Supreme Court of the State."

Act February 27. 1913, 103 O. L., 95, Sections 25, 27, 38-42; Article 4, Section 2, Ohio Con., as amended 1912.

These statutory and constitutional provisions emphasize the point that the Commission's function is in no sense legislative, but is purely administrative, consisting of the application of the standard fixed by the law itself to varying facts and circumstances. Under legislation, wherein the rights of the operator are so carefully safeguarded as they are by the provisions which we have cited no valid complaint of the kind which is here made can be urged.

Counsel for appellant claim that the right possessed by the operators under the Arkansas statute to accept or reject the mine car is taken away by the Ohio statute; and that this constitutes a controlling distinction between the McLean case and the case at bar. Of course, the right to reject is *qualified*, in that, presumably, the operator may not reject a carload which comes up to the Industrial Commission's specifications. But the right to reject when the product fails to conform to such specifications is preserved, at least by inference. And as already pointed out, the law requires the Industrial Commission to fix a standard of rejection as exacting as the operator could possibly fix it for himself. Therefore, the operator is not injured by having his right of rejection qualified in this technical sense. All that the law does is to fix by due process of law, wherein opportunity for judicial review is afforded, a *standard of rejection*, binding upon the employer but in no real sense injurious to him. The effect of having such a standard is to remove one opportunity for the perpetration by the operator of real or fancied frauds upon his operatives, and, thus, to do away with a possible cause of industrial warfare.

Coming now to Section 3, it is to be observed that the functions of the Industrial Commission are not invoked unless the operator and his employees have failed to agree upon the allowable percentage of fine coal. If agreement is made between employer and employee the terms of that agreement will doubtless fix the consequences of an overproduction of fine coal. If there be failure to agree, however, the Commis-

sion is to make as to this feature of the employment contract an order similar to that which we have already discussed respecting the unavoidable percentage of impurities. Though the order is but temporary in a sense, it may be enforced by all the sanctions underlying the enforcement of any order of the Commission. (See opinion of Court below.)

We may say as to Section 3 that its purpose is similar to that of Section 2, viz.: the obviation of *incidental* evils, which experience has demonstrated are likely to follow from the adoption of an unrestricted run of mine basis of compensation. (See Report of Commission, pp. 43 to 51, inclusive, 59.)

The production of an undue amount of fine coal, like the overproduction of impurities, constitutes in a sense an economic waste. That is to say, if either of these conditions are present, the quality of the product is very seriously impaired. Both public and private interests require safeguards against such conditions incidental to legislation compelling the choice of the run of mine basis of weight compensation.

We refer, in passing, to the fact that a companion law passed at the same session of the General Assembly at which the law attacked in the case at bar was passed, provides still further safeguards against the overproduction of fine coal. (See page 68 of Commission's Report, and 104 O. L., 161.)

We do not see how the conclusion can be escaped that the provisions of the Ohio law imposing certain duties and resultant powers upon the Industrial Commission of that State are not fairly, reasonably

and even necessarily incidental to the purposes of the Act. If they are such, then the power to pass a run of mine law implies the power *to provide safeguards against incidental evils.*

Interstate Commerce Commission v. Goodrich
Trans. Co., 224 U. S., 192;

Flint v. Stove-Tracy, 219 U. S., 107;

McCulloch v. Maryland, 4th Wheat., 316.

These conclusions being established, it necessarily follows that the Ohio law differs in no essential particular from the Arkansas law involved in the McLean case, and that the case at bar is ruled by that decision.

We refer briefly to the question respecting penalties, only to say, however, that as we understand the recent decisions, such a question is not germane to an issue such as that tendered by the bill in this case. Furthermore, we submit that a minimum penalty of \$300 for each separate offense is not an excessive one. The appellant avers in its bill that one day's violation will subject it to penalties aggregating \$800,000. We point out that if the fine were \$50 instead of \$300, the aggregate would still be in excess of \$130,000 for a single day's violation on the part of the appellant. The fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum. It also does not appear that the penalties provided by the Act are more

than sufficient to avoid clandestine frauds on the part of the operators as against the operatives.

The object of the present motion is, of course, to preserve the *status quo*. We desire to direct the Court's attention to what that status is. The affidavits on file, both those in support of and that in opposition to the motion, show the following conditions:

With the expiration of the agreement between the operators and the members of the United Mine Workers of America, covering the two-year period beginning in the spring of 1912, efforts were made to renew the wage scale agreement. The operators, or at least some of them, insist upon the screen coal basis of compensation; the miners refuse to accept any basis other than the run of mine. So long as this deadlock continues the mines in Ohio will be shut down. This Court will, we think, take judicial notice of the possible consequences of such a situation as disclosed by painful events recently occurring in West Virginia and Colorado.

The affidavit of John M. Roan shows what the attitude of the miners is, and how they are determined to agree upon no other basis than the run of mine, regardless of the outcome of this suit. In other words, they mean to secure for themselves what they regard as the benefits enjoyed by their fellow workmen in Illinois, Arkansas, and to some extent in Indiana, Pennsylvania and West Virginia.

On the other hand, the same affidavit discloses the willingness of the operators to agree upon a run of mine basis. The affidavits, when read together, will show clearly, we think, that it is only the present

existence of a temporary restraining order, and the hope that the same may be continued, that has led the operators to remain obdurate.

We feel very strongly then that if the temporary restraining order or interlocutory injunction should be issued out of this Court, its effect in Ohio might very well be calamitous.

Finally, we point out that the "irreparable injury" anticipated by the appellant and relied upon by it as a basis for injunction is greatly exaggerated. The expense *necessarily* incident to the adoption of the mine run basis by way of changes in the tipples, for example, seems to be greatly overstated. (See affidavit of John M. Roan.)

In conclusion, we call the Court's attention to the fact that we have filed herewith a copy of the Report of the Ohio Coal Mining Commission to the Governor of Ohio. We do this because the Commission's Report will, we feel, set forth in convenient form all the considerations moving the Legislature of Ohio to the enactment of the present law. Questions which may arise in the Court's mind relative to any feature of it may be answered by examination of this report. For the Court's convenience, we submit the following analysis of the report:

ANALYSIS OF REPORT OF COMMISSION.

The "Screen System" as having to do with the "Public Peace."

P. 36. A ground for "discontent."

P. 37. A cause of "disputes and bitter feeling between miners and operators."

P. 42. Is a "weapon" of the operators.

P. 58. Commission finds "inequitable."

P. 59. Commission says the "mine run" plan will allay discontent.

As to having to do with the "Prevention of Fraud."

P. 33. Change in size of mesh of screen.

P. 37 and 38. Purely arbitrary and gives operator an advantage.

P. 39. Fraud in dumping.

P. 39. Wear of screen and delay in replacing.

P. 41. The variation in the same in different mines as to purity and **breakability**.

P. 41. Operators sometimes encourage careless mining to the detriment of the miners.

As to having to do with "safety."

P. 25. The Commission finds a direct connection between the screen and safety.

P. 37. Tends to leave dust coal in the mine.

P. 19 and 22. Tends to prevent adoption of safer systems of mining.

As to having to do with "Conservation."

P. 14. There is a direct connection.

P. 19. Tends to waste the pillar coal.

P. 22. Tends to waste the pillar coal.

P. 41. Tends to waste the pillar coal.

P. 60. Tends to waste the pillar coal.

P. 37. Tends to make the miner leave the fine coal.

P. 60. Tends to make the miner leave the fine coal.

P. 50. Which fine coal is sometimes in so much demand that lump coal is crushed before use.

We do not present in this memorandum any view which we entertain respecting the questions raised by the appellant under the Ohio Constitution. The opinion of the Court below deals fully with these questions, as well as with all the other questions in the case. In that opinion will be found authorities other than those herein cited, upon the points which we have endeavored briefly to discuss.

Respectfully submitted,

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No. ~~1000~~ 513

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In the Supreme Court of the United States

October Term, 1914.

RAIL AND RIVER COAL COMPANY,
Appellant,

vs.

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stituting the Industrial Commission of Ohio,
Appellees.

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No. 1104.

In the Supreme Court of the United States

October Term, 1914.

RAIL AND RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, MATTHEW B. HAMMOND
and THOMAS J. DUFFY, as Members of and Con-
stituting the Industrial Commission of Ohio,
Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal taken under Section 266 of the Judicial Code from an order of the District Court of the United States for the Northern District of Ohio, Eastern Division, denying appellant's application for an interlocutory injunction.

The suit was begun in the District Court by the filing of a bill to restrain the members of the industrial commission of Ohio from putting into effect the so-called "mine-run" or "anti-screen law", set forth in full hereinafter, and also printed on pages 12 and 15 of the record in this case.

The bill alleges the following facts: The plaintiff, a West Virginia corporation, is engaged in the mining business in Ohio, owning 32,000 acres of coal lands of

the value of more than \$1,000,000.00, and employing upwards of 2,000 persons. In the State of Ohio there are about 600 coal mines, employing upwards of 45,000 persons; in the year 1913 36,000,000 tons of coal were produced; and upwards of \$26,000,000.00 was paid in wages to said employees.

The defendants are the members of the industrial commission of Ohio and are vested with various powers, including that of enforcing the provisions of the mine-run law.

For many years mining has been conducted in this State in accordance with wage contracts covering periods of two years, entered into between the operators and the miners. A majority of the miners are members of the United Mine Workers of America, which is a powerful labor organization, and the contracts referred to were made on the part of the miners by representatives of this organization. The last contracts so made expired on April 1, 1914.

The wage contracts provided for the screening of coal and for payment of wages at a certain price per ton for "lump coal", by which is meant such coal as would pass over a screen, the bars of which are $1\frac{1}{4}$ inches apart.

The bill sets forth the provisions of the act which are objectionable and which will be hereinafter referred to. It alleges that these provisions are unreasonable, unnecessary and arbitrary, and wholly impracticable in the operations of mining, and that the act is unconstitutional for the reasons that it violates the 14th amendment of the United States constitution, in that it deprives the plaintiff and others similarly situated, of liberty and property without due process of law, and denies to them the equal protection of the law; that the

act is not within the police power or any other power of the State of Ohio and is in violation of the bill of rights of the constitution of Ohio; also that it delegates legislative authority to the industrial commission of Ohio in violation of the constitution of this State.

It is further alleged that the industrial commission of Ohio is about to put said act into effect, and that if such be done, immediate and irreparable injury and continuing wrong will necessarily be caused to the plaintiff, wherefore a writ of injunction should issue to restrain the defendants during the prosecution of this suit and permanently from enforcing said act.

No answer to the bill has been filed and the application for an interlocutory injunction was based upon the allegations of fact in the bill, which stand undisputed. The District Court denied the application and entered an order in accordance with such denial; this appeal is taken from that order. That the allegations in the bill make a proper case for the issuance of an interlocutory injunction, if the mine-run law is unconstitutional, has not been questioned.

MINE RUN LAW OF OHIO.

The statute which the appellants claim to be in violation of the constitutions of the United States and of Ohio, is reported in 104 Ohio Laws, 181. It is as follows:

(Senate Bill No. 3.)

AN ACT

To regulate the weighing of coal at the mines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the pro-

duction of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the

system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

C. L. SWAIN,

Speaker of the House of Representatives.

W. A. GREENLUND,

President of the Senate.

Concurred February 5th, 1914.

Approved February 17th, 1914.

JAMES M. COX,

Governor.

Filed in the office of the Secretary of State February 20th, 1914.

36 G.

ERRORS COMPLAINED OF.

The appellants claim that the District Court erred in denying the plaintiff's application for an interlocutory injunction, which should have been issued, for the reasons set forth in full in the assignment of errors (Record, p. 25), which in the main are as follows:

1. That the law in question violates Section 1 of the 14th amendment to the constitution of the United States in that it deprives the plaintiff of liberty and property without due process of law; it constitutes an unwarranted and arbitrary interference with plaintiff's right to contract with its employes and to manage its business of mining, producing and selling coal, according to its own judgment; it delegates to the industrial commission of Ohio the power to determine the quality of coal to be produced.

2. That the penalties provided in said act for a violation thereof are so excessive and arbitrary as to deny to plaintiff and others similarly situated, the equal protection of the laws, in violation of the said 14th amendment.

3. Said act violates Sections 1 and 16 of Article I of the constitution of Ohio.

ARGUMENT.**I.****THE MINE RUN LAW IN ITS REGULATION OF THE BUSINESS OF COAL MINING DEPRIVES THE APPELLANT AND OTHERS SIMILARLY SITUATED OF LIBERTY OF CONTRACT AND OF PROPERTY WITHOUT DUE PROCESS OF LAW. IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

The law applies to all coal mines in the State where miners and loaders are paid for their labor on the basis of the ton or other weight of coal. As this is the prevailing method of making compensation in this State, all of the operators, miners and loaders are affected by the law.

The law requires in the first instance that miners and loaders, who are paid by weight, be paid on a "mine-run" basis, that is, according to the total weight of all the coal contained in the cars in which it is brought up from the mine. The operator is prohibited from screening the coal for the purpose of ascertaining the amount to be paid such miner or loader for his labor on the basis of a diminished quantity of the coal. A violation of this prohibition is made a misdemeanor punishable by a fine of not less than \$300.00 nor more than \$600.00 for each separate offense.

In addition to the provisions establishing the mine-run system of payment there are added others which regulate the business of producing coal in a manner never heretofore attempted. These regulatory features deprive the operators of liberty of contract with respect to the quality of coal to be produced and the manner of its production. The appellant claims that these regulations

are in derogation of its constitutional rights. The features of the law in question are as follows:

First: The power of determining the quality of coal which the operator will produce is taken from the operators and may not be the subject of contract between them and their employes. This power is lodged in the industrial commission of Ohio, which is a state board appointed by the governor.

The law requires this commission to ascertain and determine the percentage of slate, dirt or other impurities "unavoidable in the proper mining or loading of the contents of mine cars of coal" in the various mines of the state, and the operator is required to accept and pay for every car of coal sent up by the miner or loader, which conforms to the standard so fixed by the commission, whether the same is suitable for his needs or not.

Second: It is made the duty of the operators and employes to "agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed." And, in the event of disagreement between the operator and any employe, or of non-agreement, the industrial commission, upon the request of any miner, loader or operator shall "fix such allowable percentage of fine coal" which shall remain in force until otherwise agreed to by the parties.

Third: Whenever the commission finds that the total output of fine coal for a period of a month exceeds the percentage which has been fixed by it, the commission is required to make and enforce such orders "relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission."

The effect of the above provisions is to take from the operator the right to determine the kind of coal he wishes to mine and to make contracts for its production, and to require him to pay for a product irrespective of the requirements of his trade.

Coal is a natural product deposited under ground, between strata of rock or slate, the coal seam often containing slate or dirt. It is removed from place by digging and blasting. Manifestly, the purity of the coal loaded depends upon the care exercised in the work of digging, blasting and loading. The importance of the control of this matter by the operator cannot be overstated.

The amount of impurities allowable in the output of the mine are by this law to be fixed by the commission on the basis of their ideas as to what is "proper mining." Like all other producers of material the coal operator has his ideas of quality required for his trade, which he must satisfy or go out of business. The act in question delegates to a state commission not responsible to him, the power of determining what is proper mining and of fixing the quality of his product on that basis. This is a very important regulation of the operator's business and an invasion of his right to manage his business as he thinks best.

The degree of purity which the coal shall have is removed from the realm of private and voluntary contract and transferred to the industrial commission. Instead of a voluntary contract between the parties entered into after the operator has considered the needs of his market, the formations of coal in his mine, the best methods of mining, as shown by his experience, and any other considerations which appeal to his business judgment,—there will be a contract thrust upon the parties by the

commission in accordance with its ideas of "proper mining," which will result in a finding by them of the percentage of impurities unavoidable in such mining. The operator must accept and pay for every car of coal which conforms to such standard, regardless of the standard which he would fix for himself and regardless of his knowledge or ideas with respect to the permanent or transitory needs of the market and regardless of his own ideas as to what constitutes proper mining.

The same considerations are applicable to the provisions covering the determination of the percentage of fine coal "allowable in the output of the mine." The fact that the commission acts on this subject only in the event of failure of the employer and the miner to agree, or in the event of non-agreement, does not affect the situation. In the event of such disagreement or non-agreement, a contract is imposed upon the parties by a body which represents neither. After the determination is made by the commission, the operations of mining will go forward, not pursuant to a voluntary contract entered into between the parties, but pursuant to an enforced agreement beyond the control of either party. It is just as much a deprivation of the freedom of contract where a contract is imposed upon the parties in the event that they fail to agree, as where the contract is so imposed without giving them any opportunity to agree in the first place.

In order to make effective the standard of fine coal determined by the commission to be allowable in the output of the mine, it is given the power to make orders relative to the production of coal at the mine so that there after coal will be produced in such a manner as to reduce the percentage of such fine coal to the amount so fixed by the commission.

The interference with the operators' business does not, therefore, stop at regulating the quality of the product to be taken from his mine and depriving him of the freedom of contract in the premises, but includes the far reaching power to **regulate the methods of production.**

The act does not require that the commission, in issuing orders relative to the production of coal, shall take into consideration the most economical methods of mining, the needs of the market and the needs of the operators' business in general, nor many other considerations which would govern the operator himself, if left free to conduct his own business. On the other hand, the power of the commission is plenary to regulate the production of coal to the object and end that the percentage of fine coal fixed by it, shall be made effective.

We claim that it is not within the legislative power to enact these provisions and thus to regulate the operators' business, and that they are wholly unreasonable and arbitrary.

While there is a suggestion in the opinion of the District Court that corporations engaged in coal mining belong to the class of "public service corporations" which are subject to regulation by the government as such, we submit that this is unsound. **Coal lands and the coal thereunder are private property.** There is no distinction between coal mining and the mining of other minerals such as gold, copper, iron, etc., nor is the business different in principle from the pursuits of agriculture, stock-raising, lumbering and the like. These lines of business have never been regulated by government, but they always have been conducted by those engaged therein with perfect freedom, subject only to such restrictions as have been imposed in the interest of public health, welfare, etc. No claim has been made heretofore that the legisla-

ture could regulate such lines of pursuit on any other theory. The law on this point has been well stated by the Supreme Court of Illinois in *Millett v. People*, 117 Ill., 294, as follows:

“The main reliance of the counsel representing the State, to sustain the ruling below, seems however, to be on the ground that mining for coal is affected with a public use, so that it may be regulated by law, like public warehouses, as held in *Munn v. Illinois*, 94 U. S., 113. It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of innkeepers, common carriers, millers, etc.; and in our opinion it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligations to obtain a license from any public authority, and therefore when he chooses to mine his coal he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public.”

In view of the foregoing, the considerations which, in the case of *German Alliance Ins. Co. v. Lewis*, 233 U. S., 389, moved this court to hold that the business of fire insurance is affected with a public use, do not exist here. The court on page 415 says:

“But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every

article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.' "

It is to be noted that the opinion in this case expressly limits the holding to fire insurance legislation.

That the right to choose one's business and to make any lawful contracts in respect thereto are property within the protection of the fourteenth amendment to the constitution of the United States will not be denied (*Slaughter-House cases*, 16 Wall., 37; *Allgeyer v. Louisiana*, 165 U. S., 578; *Adair v. United States*, 208 U. S., 161, 172).

Freedom of contract, protected by the fourteenth amendment to the constitution of the United States, is not, however, absolute, even when the business is a private business, but is subject to limitations lawfully enacted under what we know as the police power. The limits of the police power cannot be marked with precision. The authorities, however, establish the proposition that a law which interferes with private property, or which takes property or denies or restricts freedom of contract, must, in order to come within the scope of the police power, bear some substantial relation to the public peace, safety, health, morals or welfare of the community and must not be arbitrary or unreasonable. When a statute does not comply with these conditions, it constitutes the taking of property without due process of law. *Adair*

v. United States, 208 U. S., 161; Minnesota v. Barber, 136 U. S., 313; Holden v. Hardy, 169 U. S., 366; Welch v. Swasey, 214 U. S., 91; Smith v. Texas, 233 U. S., 630.

In Welch v. Swasey, *supra*, Justice Peckham clearly states this rule on page 105:

"The statutes * * * must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. **If the means employed, pursuant to the statute, have no real, substantial relation, to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity.**"

In Adair v. United States, *supra*, the court said on page 173:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the Federal constitution. *Allgeyer v. Louisiana*, 165 U. S., 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the fourteenth amendment was not designed

to interfere. *Mugler v. Kansas*, 123 U. S., 623; *In re Kemmler*, 136 U. S., 436; *Crowley v. Christensen*, 137 U. S., 86; *In re Converse*, 137 U. S., 624 * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

There are numerous cases in which laws intended to preserve the public health, safety, morals or welfare were upheld on the grounds that it did not appear that the laws were arbitrary, unreasonable or did not sustain a substantial relation toward the object sought. It will not be profitable to examine these cases at length, inasmuch as the general rule is clear. We may, however, profitably quote the language of Justice Holmes in *Hudson Water Co. v. McCarter*, 209 U. S., 349, 355, wherein he said:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without com-

pensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point."

None of the cases go to the extent that a private business may be so regulated by the government as to give the government substantial control of the operation of the business; they merely allow such necessary abridgment of the freedom of contract and of dealing with property as the public health, safety or welfare require.

We will now examine the act under consideration, and see whether it encroaches upon the freedom of contract in an arbitrary, unreasonable and unnecessary manner. And first let us examine and distinguish the case in this Court, namely, *McLean v. Arkansas*, 211 U. S., 539, where this court upheld the Arkansas mine-run law, which is claimed to be decisive of the case at bar. We contend that the law there sustained is totally different from the Ohio law. The statute there prohibited the operator from screening coal before the total output mined by the miner had been weighed and duly credited to him.

This law was considered and sustained by the Supreme Court of Arkansas in 81 Ark., 304. That court said:

"The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal

'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'

The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded."

On a writ of error to this court, the holding of the Arkansas court was sustained. Justice Day, in his opinion, referred to a federal investigation of the conditions of labor in the mining industry, in which testimony had been taken, tending to show that frequently differences had arisen between the miners and the employers because of the disarrangement of the bars of the screen, where the screened coal system was in use, so that larger coal would go through the screen than the contract between the parties contemplated, thereby preventing a correct measurement of the coal and defrauding the miner of a part of his wages. He held that the law had been enacted to prevent this fraud and to secure more harmonious relations between the miners and their employers which had been disturbed by the fraudulent practices. On p. 550 he said:

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts."

He, however, called particular attention to the fact which had been emphasized by the Supreme Court of Arkansas, that this law expressly reserved to the operator the right to reject or accept coal sent to the surface by the miner. He said on page 548:

“It does not prevent the operator from rejecting coal if improperly or negligently mined and shown to be unduly mingled with dirt or refuse.”

The McLean decision represents the farthest limits to which this Court has gone to sustain legislation of the character in question. The difference between the Arkansas act and the Ohio act is very marked in the matter above pointed out.

The Arkansas act gives the operator complete freedom to reject and refuse to pay for the mining of any and all coal which comes to the surface which is not of the kind suitable for his purposes and market. The Ohio act, on the contrary, gives to the operator no option, but requires him to accept and pay for all coal sent to the surface by his miners, irrespective of whether suitable to his trade or not, so long as it conforms to the standards of purity and fineness which the commission has seen fit to establish.

It was obviously this liberty which the Arkansas statute left to the operator to deal with his own property as the demands of his trade should require, which was a fundamental consideration leading both the Supreme Court of Arkansas and the Supreme Court of the United States to sustain the exercise of legislative power involved in the act there in question; and the distinction between a statute which leaves the operator full liberty to reject and refuse to pay for the mining of a product, which he considers unsuitable to his needs, and a statute which leaves him no such liberty, but delegates to a public commission the power of determining what kind of product he shall accept and pay for, entirely irrespective of those needs, is certainly vital.

One of the principal questions now presented, therefore, is whether a statute which restricts the right of the

owner of property to such an extent as to require him to take and pay for material which he does not want and perhaps cannot use, is a reasonable exercise of the police power. Certainly such a statute is not sustained by the principles announced by this Court in the McLean case. Can it be sustained upon any recognized principle as a reasonable exercise of legislative power, or must it be condemned as arbitrary, unreasonable or unnecessary?

First let us see what is meant by the words "arbitrary, unreasonable or unnecessary" as used in the cases. We are not aided by any attempt at definition in the cases reported. We must deduce their meaning from the cases decided, where laws have been sustained or annulled as arbitrary, unreasonable or unnecessary under the peculiar circumstances involved. Each case depends on its own facts. A provision in the law is "arbitrary, unreasonable or unnecessary" where the end sought is not a proper one for legislation, or where the provision bears no substantial relation to that object, or deprives a party of a substantial right in some way wholly unnecessary to the end sought, or in an arbitrary or unreasonable manner.

That the right of determining the quality of coal that he needs in his business is vital to the operator's success, cannot be denied. That he should be left free to contract for such quality with his employes and be able to control them in its production is equally vital.

The bill avers (paragraph 17, section 5, Rec. pp. 7 and 8) that the proposed plan of control and supervision by the industrial commission is arbitrary, unreasonable and wholly impracticable in the daily business operations of mining. It must be assumed here that on the hearing upon the merits, evidence will be offered to sustain these averments. Suppose it is made to appear that there is no

practical means of determining the percentage of fine coal "allowable in the output" or of impurities "unavoidable in proper mining;" and further, that if any percentage of allowable impurities is fixed, that there is no practicable means of ascertaining whether a given car of coal complies or fails to comply with such requirement, and that the operator must guess at his peril what the fact is. Then clearly the arbitrary and unnecessary character of this provision would avoid the act.

Certain of these matters are so obvious that the Court will be able to apply them to the present situation without proof. The standard set up by the statute for determining the amount of impurities depends upon the commission's conception of what amount of impurities are unavoidable, which in practice may differ in every mine, in every room of the same mine and indeed in every car of coal mined; it depends upon the commission's conception of what constitutes "proper mining," when it is well known that there are many standards and kinds of mining which are regarded as proper, and that each of these several standards and kinds of mining results in producing different percentages of fine coal and impurities; and worse than all this, it requires that the commission shall determine a standard of fineness and purity for all coal taken out of a given mine, without knowledge of the particular requirements of the mine owner at that time. It is clear, therefore, that what is "allowable" and what is "unavoidable" in proper mining is a matter depending upon constantly varying circumstances and a matter upon which no two men may agree. Each operator has his own ideas on this point, and the law substitutes for such ideas those of the commission. The basis of the commission's findings being speculative, the results arrived at will be worthless and

without relation to the end for which they are to be used.

When it comes to the application by the operator of the commission's judgment in these matters, it is also apparent that it will be practically impossible to determine the amount of impurities contained in any given car of coal. No method of measuring impurities has been suggested either in the course of the argument below or in the report of the Ohio Coal Mining Commission. That report concerns itself solely with the advantages and disadvantages of the mine-run system, as such, but throws no light upon and discloses no consideration of the practical application of the regulatory features to which we are objecting.

In coal mining, as heretofore practiced, as coal comes to the surface it is possible for the representative of the operator on the tippie to determine roughly from such superficial inspection as is there practicable, whether it is sufficiently free from impurities to meet the requirements of the market, and the inspector may, and oftentimes does, doubtless pass cars containing an excess of impurities, knowing that the general run of the coal on the dump will be sufficiently pure for the purposes of the market. This is necessarily a rough "rule of thumb" method of passing the product, which answers the practical purposes of the mine owner.

But when a commission is authorized by statute to fix a definite percentage of impurity below which the product must not fall, and on the one hand, requires the operator to accept and pay for all coal above that standard, and on the other, subjects the miner to a penalty for all coal mined that falls below it, the "rule of thumb" is no longer applicable. Men cannot be punished by the courts for failure to comply with a standard which can

only be applied by guess, nor is there any other practicable means of measuring impurities. The contents of each car cannot be overhauled; such a requirement would put a stop to mining and in any event would result in no definite determination of percentages. There is no feasible method of separating impurities after the mine car is loaded. This cannot be accomplished by screening, for some of the impurities being large would pass over the screen, while fine dirt would pass through. It would be obviously impracticable, from the operating standpoint, to pick out the impurities by hand and weigh them.

The difficulties of applying a standard to the quality of coal mined is, moreover, immensely increased by the fact that each car must be tested by itself in order to determine whether the individual miner who produced it has complied with the legal requirements.

The plaintiff employs over 2,000 persons, and produces over 2,800 cars of coal per day. It would be wholly impracticable, even if possible, to ascertain whether every car complied with a given allowable percentage of impurities or not. The result is that the operator would have to guess at his peril what the percentage is.

But this is not all: what possible good can be derived from an ascertainment of the allowable percentage of impurities for each mine in the state, and whether every car of coal conforms to such percentage? What advantage results to the public, or the employe, or the employer from imposing this regulation upon the operator, which results in depriving him of the freedom of contract, of control over his business, and even if practicable, would necessarily cause a great deal of expense? The act requires the commission to make a determination for each separate mine in the state, and there may be as many de-

terminations and, therefore, as many standards as there are mines.

The salability of coal and the standard thereof required for the general market do not depend upon particular conditions in a given mine. The purpose and operation of the act, therefore, is not to fix a standard of purity which would take into account marketability. In other words, the standard arrived at by the commission must often be a standard quite different from that which the operator must apply in his business. We do not think that the legislature may either by law or commission, constitutionally fix a standard of quality which the owner of a coal mine must produce, or for which he must pay his miners, but if such standard is to be fixed, it should certainly bear some necessary relation to the marketability of his product. It should, in any event, not be a standard which serves no useful purpose to anybody, but imposes an arbitrary and utterly unnecessary burden on the operator.

It has been suggested by the defendants, and also by the Court below, that the determination of the commission on this point does not prevent the operator from cealing the coal before sending it to market. But this only emphasizes the uselessness of the determination of the commission. If the commission, basing its findings upon "proper mining" in a particular mine, fixes a higher standard than the market requires, then an unreasonable and unnecessary burden and expense is imposed upon both the miner and the operator. If the standard is lower than the market will permit, the additional expense of cleaning the coal and taking out impurities (which should have been taken out in the mine) to fit the coal for the market, is likewise an unreasonable and unnecessary expense to the operator. If the determination of the com-

mission accords with the needs of the market, it will be by accident and not by design, since the commission will be guided by what is "proper mining," in view of the peculiar conditions of each mine, and not by the demands of the coal trade, which do not depend upon the local conditions in any mine.

As we have shown above, an interference with the use of property and with the freedom of contract may be justified in the interest of the public welfare, where the means are reasonable and have a proper relation to a proper end.

But this is not such a case; neither the welfare of the public, nor of any member thereof is advanced by the burdensome and wholly impracticable and useless determination of the industrial commission. That determination is unreasonable, arbitrary and unnecessary for the following reasons:

1. The percentage of impurities, depending upon a consideration of what is "unavoidable in proper mining," cannot be definitely ascertained, but must always be a mere matter of opinion based upon circumstances varying in each mine and even in parts of the same mine.
2. No practicable means exists, or can be suggested, for determining whether a car of coal conforms to any percentage requirement.
3. The determination of the commission with respect to each mine and the application thereof to each car of coal will be useless, and will occasion large expense with no compensating benefit to the public, the operator or the miner.
4. The introduction of a percentage system will cause nothing but discord and trouble. Under the law in question he is told in advance that he may load a certain

percentage of impurities, and necessarily a controversy will arise whenever a car looks as though it may exceed the standard fixed by the commission.

It is urged that these features in the act are merely incidental to its main purpose; that they are intended to prevent some of the evils to the operator, due to the installation of the mine-run system; that the employe under that system might be tempted to send up from the mine coal containing too much impurity, or too much fine coal. If, however, the purpose of the regulatory features is to prevent this evil, and thus protect the operator, then the means employed have absolutely no relation to the end, for, as we have shown above, the impurities may still be too great for the operator's business, because the determinations of the commission will not be based upon the demands of the coal trade.

The supposition is also indulged in that these regulatory features are necessary to protect the operator against the evils of sending up too much dirt and fine coal, which must mean that the operator is unable to contract with his employe for the kind of coal he wants, or, that if he can make such contracts, he will be unable to protect himself from violation of the same.

It is urged that, therefore, the **state** must step in and take away the right to contract freely on this subject, and that the **state must make the contract** for the parties itself, and require the observance thereof insofar as the impurities are concerned by criminal penalties, and insofar as the fine coal is concerned by regulating the methods of production.

Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts? The cases that sustain the regulation by law of the method of paying

employees, the hours of labor, etc., taking from parties concerned freedom of contract in that regard, are all sustained on the theory of the protection of the weaker party against imposition by the stronger. They are all founded upon a supposed inequality of position of the parties to the contract. In such cases the state is permitted, under certain circumstances to legislate for the protection of the dependent party against unwise contracts and to abridge the otherwise absolute freedom of contract. *Knoxville Iron Co. v. Harbison*, 183 U. S., 13; *Holden v. Hardy*, 169 U. S., 366, 395; *Muller v. Oregon*, 208 U. S., 412; *R. R. Co. v. Williams*, 233 U. S., 685.

But further, the provisions in this act under discussion, so far from protecting the operator against unwise contracts, subject him to drastic burdens and measures entirely beyond his control. His right heretofore existing to determine for himself the quality of the coal to be mined and for which he shall pay is taken away, and he is required to accept and pay for a product which he does not want, regardless of his needs and regardless of the amount of fine coal contained in a mine car, and he can reject and refuse to pay for the same in only a single contingency, namely, when it contains more impurities than the commission has fixed. In all other cases he must accept and pay for the product. The determinations of the commission are entirely beyond his control, and both by the terms of the act and in the very nature of the case, are based upon considerations different from those which would govern the operator if left to conduct his business according to his own judgment. Could anything be less of a benefit and protection to the operator and more of a useless burden than to have the quality of the product of his mine to be determined by anyone other than himself; to require him to pay for a product

which may be different from that which the coal trade demands; and to subject him to the expense, which otherwise would be unnecessary, of fitting such coal for the market? How can it be urged that these provisions in the law are incidental to its purpose and intended to protect the operator from imposition on the part of his employe? How is anyone benefited by these burdensome regulations? We think it clear that neither the public in general, nor the employe, nor the operator can derive any benefit whatsoever from these regulations. If this is so, then it was not within the police power of the state to enact them.

We submit, therefore, that the regulations and burdens imposed by this act heretofore set forth, not only are wholly impracticable in operation, but that they have no reasonable connection with the purpose of the law and serve no useful purpose whatever, but are wholly arbitrary and unreasonable; and that they therefore constitute an unwarranted interference with the liberty of contract and the use of property.

It will be urged that it must be presumed that the industrial commission will act in good faith in the performance of its official duty. Whether the commission will determine the quality of the product better or worse than the operator is immaterial; **the constitutional right of the operator to regulate his own business, according to his own judgment, and to make contracts freely in connection therewith, is nevertheless taken away.**

The Court below suggests that the commission merely will fix a standard which will exclude all impurities, except such as are unavoidable, and that the operator, if given the unrestricted right of contract, could do no more. This position is unsound. The quality of coal that an operator may need for his customers may be such

as can be produced only by extraordinary mining methods, and he has a right to employ those methods, notwithstanding the ideas of the commission as to what may constitute "proper mining."

We rest this branch of the case on the proposition that the operator has the constitutional right to determine for himself the quality of the product which he requires, and for which he shall pay, and to make voluntary contracts to that end.

With respect to the amount of fine coal allowable in the output of the mine, it is no answer to say that the commission acts only in the event that the parties are unable to agree, for, after the commission has made a finding on this point, the mining will not be conducted pursuant to a voluntary contract, but pursuant to an enforced arrangement determined by the commission. The liberty of contract and the right to produce what one desires from one's property is nevertheless taken away. The constitutionality of the act must be determined, not by what has been or will necessarily be done under it, but by what may under its authority be done. *Eubank v. Richmond*, 226 U. S, 137. 144; *St. Germain Irrigating Company v. Hawthorne Ditch Company*, 143 N. W. 124, 127; *Sterritt v. Young*, 14 Wyo. 146.

Nor it is an answer to our objection to the law to say that the orders and findings of the industrial commission are reviewable in the state courts. The establishment by the commission of a percentage of impurities so high as to make the coal unmarketable might shut down the mines during the court review, with losses that would be irreparable. If the power of the state does not extend to such a regulation then the lack of that power is not supplied by providing for a court review.

If this law can be sustained, like regulation of other lines of industry is proper. A state commission may be given the power to determine the kind of vegetables or grain a farmer should raise, because in raising certain prohibited kinds, the farmer's employes do not receive just compensation. The state may regulate the kind of articles which a wholesale house should deal in, if it be represented to the legislature that in selling certain kinds of commodities, the salesmen do not receive in full the compensation they have contracted for. Suppose also, it should be represented that tailors, plumbers and other laborers doing piece work were partly defrauded by their employers in calculating the amount of their compensation, it would be justifiable for the state to determine for the parties what kind of articles they might produce upon which the compensation should be calculated. There would seem to be no limit to the power of the legislature, if cases like these are held to justify such state control.

In conclusion on this subject, we incorporate herein the following warnings against those subtle inroads against these constitutional rights, which seem to be gaining in our courts. In *R. R. Co. v. Ellis*, 165 U. S. 150, 153, Justice Brewer says, quoting from 116 U. S. 616, 635:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Justice O'Brien in *People v. Williams*, 189 N. Y. 131, 135, says:

"The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort and health of the community, and that a wide range in the exercise of the police power of the State should be conceded, I do not deny; but, when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked, to protect against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body."

Opinion of the District Court as to the Police Power.

The Court below considered this law to be within the police power of the state, relying upon the *McLean* and other cases cited. We need add nothing to what we have already said as to the general scope of that power, but we again call attention to the fundamental difference heretofore pointed out between the statute sustained in the *McLean* case and the Ohio act,—a difference which the Court below does not appear to have considered.

In the *McLean* case the Court went to the extreme limit that has thus far been reached in sustaining the exercise of the police power for the purpose of protecting the interests of the employed, and in reaching that limit this Court was not unanimous. It was there held that the right of the employee to contract

with his employer was not denied or unduly restricted by requiring him to pay for the mining of coal sent to the surface without putting it over the screen, **because he could avoid paying for it altogether by rejecting it.** Obviously this right of rejection, under the Arkansas act, was unlimited. Under that act the mine owner was not only at liberty to reject coal sent up by his miners because it contained too much fine coal or too many impurities, but he could even reject it arbitrarily. With this liberty thus left him, the majority of the Court very properly thought that the statute did not deprive him of his right to deal with his men and his property as his requirements might suggest.

Turn now to the Ohio act, which leaves the owner of a mine no option whatever as to the fineness or purity of the coal he shall produce. It requires that he shall pay his men for the coal they may send to the surface without screening it, and without any reference to whether the coal will in his judgment answer the requirements of his trade. It substitutes the judgment of the commission for the judgment of the property owner as to what coal he must accept and pay for, and in making this substitution it does not even provide that the commission shall take into account the market requirements of the mine owner, but seems to contemplate that the commission's judgment shall be based upon wholly different considerations, such as what is "allowable" or "unavoidable" in the process of mining. We submit that such an extension of the police powers of the state is not only not contemplated by the Court in the McLean case, but that it has never been entertained by any court. It may be difficult to define the precise boundaries of the police power, but here there can be no question of precise boundaries. The Ohio act, by depriving the owner of

private property of all control of the question what he shall produce from it, goes so far beyond any boundary thus far suggested or attempted, that nice definitions of the police power become unnecessary and superfluous.

In addition to other supposed purposes of the act already discussed, the Court below seemed to consider it as possibly promotive of the safety of the miners while at work, by preventing the undue accumulation of fine coal. It may well be doubted whether any such purpose would be promoted by the statute. There was already on the statute books of Ohio a law which required, under penalty, the removal of all fine coal from mines.

The courts will hardly indulge the presumption that it was the intention of the legislature to provide against the contingency that the miners of the state would violate a penal statute already in existence.

But if the act was intended to promote the safety of miners, then it is clear that the means employed to that end are wholly unreasonable and arbitrary. How is the safety of miners enhanced by delegating to a state commission the power to determine the amount of impurities allowable in any mine; or by requiring the operator to accept and pay for all coal conforming to the standard so fixed; or by delegating to a commission the power of determining the amount of fine coal which may be produced? These burdensome regulations are so entirely dissociated from any idea of safety and so inappropriate for that purpose, that we cannot believe that the legislature enacted them for that purpose, especially in view of the fact that there was already on the books a statute requiring, under penalty, that all fine coal be removed. Instead of safety, the plain purpose of the statute was the same as that of the Arkansas act, namely, to prevent fraud in the measurement of that upon which the miners' compensation depended.

The mere fact that an act, plainly and primarily intended for one purpose, e. g., to prevent fraud upon the employee, may incidentally and indirectly result in some other benefit, such as safety, does not indicate that safety was the object of the statute, much less does it justify the statute as an exercise of the police power on the ground of safety. Can it be imagined for a moment that the legislature of Ohio or Arkansas would have passed these laws and provided the elaborate machinery of a commission to determine the purity and fineness of the coal for which an operator must pay his miners, for the purpose of reducing the dangers of mining? And if such could be supposed to have been the legislative purpose, could a statute having safety for its object be sustained on that ground, which contained clauses wholly unnecessary and unrelated to the subject of safety, and which at the same time curtail and destroy the right of private contract? If, therefore, this statute is to be sustained, it must be on some other ground than public safety.

The Court also seemed to consider that the act would tend to conserve natural resources by furnishing an incentive to remove fine coal from the mines. Here, too, it is clear that if that was the object of the statute, the burdensome regulations imposed upon the operator sustain no reasonable connection therewith. The conservation of the coal supply is not furthered by delegating to a state commission the power to fix the quality of the coal which may be removed from the mine and for which the operator must pay, or the power to determine the amount of fine coal allowable; nor are the findings and orders of the commission based upon questions of conservation.

Besides, no one can be required to conserve his private property for the public unless he receives due compensation. The Court below cites certain cases which dealt with the conservation of oil and gas; but such minerals are easily distinguished from coal. No surface owner has an absolute ownership of the former until he reduces the same to actual possession; they move about under the surface and have been compared to *ferae naturae*, and also to the waters of a stream which the superior owner of lands may not divert or extravagantly waste, to the detriment of the inferior land owner; but ownership of coal and other minerals *in situ* is absolute. The owner of coal land has as complete a right over his property as the owner of agricultural land. This distinction is recognized and pointed out by this Court in *Ohio Oil Company vs. Indiana*, 177 U. S., 190, 202, wherein White, J., says:

“Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs* under a particular portion of the earth's surface within an area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The

waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In *Brown vs. Spilman*, 155 U. S., 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown vs. Vandergrift*, 80 Penn. St., 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases, (Penn.) 103.' "

The Court below cites *Hudson Water Co. vs. McCarter*, 209 U. S., 349, in which a statute was upheld which prohibited the transportation of water of the state of New Jersey to any other state. This case rests on the same basis as the oil case just referred to. The Court likens the power of the state to control the waters therein to its power to make laws for the preservation of game (p. 356).

Wilmington Star Mining Co. vs. Fulton, 205 U. S., 60, also cited by the Court below, has nothing to do with the conservation of natural resources. The statute there upheld was intended to promote the safety of the miners by requiring that only licensed mine managers and examiners be employed.

While, therefore, there are cases where waste of certain natural resources may be prevented by proper regulation, none of them go to the extent of holding that property capable of private possession and private ownership and actually so held, may be conserved in the interest of the public, without paying full compensation. It needs no argument to show that any restriction upon the use of private property in the interest of the public is *pro tanto* deprivation.

The Court in this connection also referred to a recent amendment to the Ohio constitution permitting the passage of laws for the conservation of natural resources. This amendment was obviously intended merely to give the legislature power (always of course within the limits prescribed by the bill of rights) to pass laws for the conservation of the natural resources of the state. For instance, laws for the preservation of forests may, doubtless, be passed, and state forests may be created, or rights in private forests abridged by the exercise of the right of eminent domain; but nobody would claim for a moment that a private citizen's forest could be taken or his right to cut trees therein limited without compensation. Even if the conservation amendment was intended to abrogate the guaranties of the bill of rights in the Ohio constitution and to permit the taking of private property for the public benefit without compensation, then it is in clear violation of the fourteenth amendment of the constitution of the United States.

II.

THE PENALTIES PRESCRIBED BY THIS ACT ARE SO EXCESSIVE AS TO DEPRIVE THE APPELLANT OF THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 6 makes violations of the act by the operator a misdemeanor, punishable by fines of not less than \$300 nor more than \$600 for each separate offense. The screening of each and any car of coal in order to determine the compensation to be paid therefor is a **separate offense**. If an operator who is advised that this act violates the constitution of the United States and of Ohio and so believes in good faith,—fails to observe the law, he will be subject to this penalty for each violation, in the event that the act be finally held valid.

It is stated in the bill and must therefore be taken as true for the purposes of this hearing, that the minimum fines would amount to over \$800,000.00 for each day's operation of appellant's mine contrary to the act. A judicial determination of the validity or invalidity of this law requires several months, as is evident from the record in this case. The total amount of fines which might be imposed upon the appellant for operating during a period of, say six months, pending this judicial determination, would be upwards of \$12,000,000.00, even though the minimum penalty were imposed for each violation. The maximum penalties would exceed \$24,000,000.00. The amount which might be imposed upon all of the operators within the state for operating during a like period is so large as to be beyond comprehension.

We, therefore, have here a law, the penalties for the violation of which are so terrifying in their cumulative

severity as to force the operator either to submit to its provisions pending the determination as to its validity, no matter how sincerely he may entertain the opinion that the law deprives him of his constitutional rights; or, on the other hand, to close his mine and suffer incalculable losses, for which he can never hope to be reimbursed, even if the courts finally sustain his claim that the law is invalid.

The effect of a law such as this is to deprive the operator of his day in court. If he violates the law, he may be subject to the excessive penalties to which we have referred. If he complies with it, pending the determination as to its validity, and the law is finally held unconstitutional, he will in the meantime have been deprived of the exercise of the rights guaranteed to him by the constitution. For the deprivation of liberty and property during this period, he will never be made whole. The loss to the operator through having to pay for a product regardless of his market requirements; the loss due to applying the determinations of the commission to every car of coal; the loss due to complying with the orders of the commission relative to the production of fine coal,—all would be irreparable. The constitutional rights here taken away by the enforcement of the law in question are exceedingly valuable and practically indispensable to the successful operation of the mine owner's business. The value to him of the right of fixing the quality of his own product and of contracting freely on that subject with his employees,—of which right the act will deprive him if he submits to it,—is too valuable to be thus lightly taken away by the imposition of penalties so excessive that the operator is forced to surrender.

The value of the right referred to is further emphasized by considering the fact that close competition exists, not only between the operators of this state themselves, but also between them and the operators of other states, such as Pennsylvania, West Virginia and Illinois. Any handicap or burden which is imposed upon the operators in Ohio, and not upon their competitors, will seriously affect the interests of the former.

But this is not the only loss which will fall upon the operator. In order to comply with the law, each operator must make changes in the tipples at the mines. The total expense of making these changes for all of the coal mines in the state would amount to over \$1,000,000, as stated in the affidavit of Charles E. Maurer filed in support of the application to this Court for a temporary restraining order. If the operators incur this expense, even though they are correct in their claim that the law is unconstitutional, there will be no means of reimbursing them.

This Court has held that laws which prescribe penalties so excessive as to compel submission to their terms, with all the resulting loss and inconvenience rather than the risk of such penalties, violate the 14th amendment to the constitution, in that they deny the equal protection of the laws.

The law on this point is stated in *Ex parte Young*, 209 U. S., 123. On p. 146, the Court, quoting from *Cottig v. Kansas City Stock Yards Co.*, 183 U. S., 79, at p. 100 and 102, says:

"Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extrava-

gant and unreasonable loss? * * * It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In the Young case, a railroad rate act was held unconstitutional on the ground that the penalties were such as to intimidate the railroads into submission rather than risk the penalties. The Court says on p. 148:

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The Young case was followed in *Mo. Pac. Ry. vs. Tucker*, 230 U. S., 340.

It was suggested in the opinion of the Court below that the operators could violate the act just once in order to have it tested and then comply with its provisions. In view of the considerations we have set forth above, this suggestion has no sound basis. We have shown that the loss and inconvenience, which necessarily results from complying with the law, (e. g., reconstructing tipples, loss in competition, expense of applying the determinations of the commission, etc.) for which the op-

erator cannot be reimbursed, are very great. The value of the constitutional rights taken away by this law, is too great to be thus trifled with. In *Ex parte Young, supra*, it was suggested to the Court that it should not enjoin the enforcement of the act in question there, for the reason that its constitutionality could be tested in a criminal prosecution after a single violation. The Court, on p. 163, disposed of the suggestion in language peculiarly appropriate here:

"It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and **if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.**"

Without the penalties prescribed in this act, it would be wholly inoperative and would fail in its purpose. Without the penalties the operator could use screens and otherwise violate the act with perfect impunity. It is clear that the court in its equity jurisdiction could not compel compliance with the law, as that would involve a continual supervision and exercise of power over a private business which no court would assume.

If the operator and miner should agree that wages be calculated on a screened coal instead of mine-run

basis, it is clear that the miner could not by civil suit recover wages on a mine-run basis for the reason that there would be no contract in existence, fixing the amount of wages on such basis. Even if there were such contract, and the operator should refuse to calculate compensation on a mine-run basis, the miner would be without remedy in a civil action, because he could not prove the tonnage upon that basis. Further, any civil remedy would be entirely inadequate to the miner to enforce the act, not only because he could not prove the facts necessary to sustain such action, but because the necessary frequency of such actions would deprive him of their value.

We think it clear, therefore, that without the penalties, the operator could do as he chose and the act would utterly fail.

The situation here is entirely different from that of *Willcox vs. Gas Co.*, 212 U. S., 19, 54, and kindred cases, where though the penalties were held void, the acts in general were sustained. In that case, which involved the validity of a statute fixing the price of gas, there were ample civil remedies to enforce compliance with the law, as for example, mandamus, revocation of charter, revocation of franchise, and refusal on the part of customers to pay more than the statutory price. No such remedies, however, exist to insure compliance with the statute in question, and if the penalties are excessive, the whole act is invalid.

Since the penalties here prescribed are vital to the operation and enforcement of the act, and are so excessive as to result in an enormous destruction of property and deprivation of personal rights while a test of constitutionality is being made, we submit that the whole act is thereby vitiated.

III.

**THIS ACT IS UNCONSTITUTIONAL UNDER THE
CONSTITUTION OF THE STATE OF OHIO.**

If the act in question deprives the appellant of liberty and property without due process of law, or denies to it the equal protection of the law in violation of the 14th amendment of the United States constitution, then further discussion is of course unnecessary. But even though it could be held that this act does not violate the constitution of the United States, as interpreted by this Court, still we shall submit that the act is invalid under the constitution of the State of Ohio, as construed by the Supreme Court of that state, which in cases involving questions of state policy this Court has often declared itself bound to follow.

In 1900 there came before the Supreme Court of Ohio the mine-run act of 1898 which was practically identical with the statute of Arkansas passed upon by this Court in the case of *McLean vs. Arkansas*, supra. The Ohio act of 1898 (93 O. L., 33) provided that:

"It shall be unlawful for any mine owner, lessee or operator of coal mines in this state, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio."

Like the Arkansas statute it left to the operator complete liberty to reject and refuse to pay for all coal sent to the surface which did not suit him. It was, therefore, a much less drastic law than the one we are considering, which not only forbids the use of a screen and

requires payment on a mine-run basis, but takes away from the mine owner all liberty of rejection or choice as to what he shall pay for and places the decision of these vital matters in the hands of a commission. So far, therefore, as the act of 1898 operates to restrict the right of private contract, it was much less objectionable than the present law. Yet the Supreme Court of Ohio held the act of 1898 invalid as an invasion of the right of private contract, guaranteed by the Ohio constitution.

The Court says of the act (p. 438):

"Its purpose is to terminate the rights heretofore universally recognized in this state, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the state expressly disclaim any authority in the legislature to determine the price to be paid for mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal, miners have become entitled to receive and operators have become bound to make, compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. * * * It is suggested as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to

provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. * * *

This act may be invalid for other reasons, but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make compensation according to the value of the service rendered and received."

As we have said the present law is subject to exactly the same infirmities as those held fatal in the Preston case, and contains, in addition thereto, provisions which constitute still greater invasions of the liberty of contract. It is, therefore, no longer an open question in Ohio that the police power of the state does not extend to the passing of a mine-run law and that such a law deprives both operators and miners of rights of contract guaranteed by the Ohio constitution in its bill of rights. This Court, as well as the other federal courts, is bound by the construction which the highest state court places upon the constitution of that state. *Merchants' Bank vs. Pennsylvania*, 167 U. S., 461; *Haire vs. Rice*, 204 U. S., 291, 301; *Express Company vs. Ohio*, 165 U. S., 194, 219; *Oakes vs. Mase*, 165 U. S., 363; *Debitulia vs. Lehigh Coal Co.*, 174 Fed. Rep., 886, 888.

The defendants rely on two recent amendments to the Ohio constitution to sustain the law, notwithstanding the Preston decision.

These amendments are sections 34 and 36 of article II, the former of which is as follows:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and

providing for the comfort, health, safety and general welfare of all employees, and no other provision of the constitution shall impair or limit this power."

Section 36 provides that:

"Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been on may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

If in 1900 when the Preston case was decided, a mine-run law less obnoxious to constitutional guaranties than the one under discussion, violated the bill of rights of the Ohio constitution, how can the present law be sustained? It can only be under the assumption that the amendments referred to repeal the bill of rights, at least in respect of the subjects therein mentioned, and that the rights heretofore held sacred thereunder may now be taken away by statute.

Section 34 above quoted is certainly broad enough in its literal terms to authorize the legislature to pass a law by which an employer's property, liberty and even life may be taken, if only such sacrifice be "for the comfort, health, safety and general welfare of all employes." Can it be that by declaring that the legislature may pass laws for the comfort and welfare of employes, and fur-

ther declaring that "no other provision of the constitution shall impair or limit this power," the people of Ohio intended to subordinate the life, liberty and property guaranteed elsewhere to all other classes of citizens, to the comfort and welfare of one class? Can it be that those fundamental rights to life, liberty and the pursuit of happiness, which have always been held to belong to every man alike and to underlie the entire structure of our government, have been abolished by the people of Ohio so far as they may interfere with laws passed for the benefit of employes? Certainly no court will for a moment indulge such a supposition.

If this provision of Section 34 does not repeal or abolish all the guaranties of the bill of rights in these respects, does it repeal or abolish part of them? If the legislature is still prohibited from passing laws which will take away **all** my property and give it to the class known as employes, is it permitted by this new amendment to take a **part** of it away and give it to that class? If not, then does it not follow that the line beyond which the police power of the state may not go in derogation of the rights of the people to their life, liberty and property, is just where it always was? Does it not follow that the new amendments were not intended to repeal the sacred rights guaranteed under the bill of rights, and were not intended to lessen or weaken them? For if section 34 has any reference at all to these fundamental rights, then it plainly refers to and destroys all of them, for it says that "no other provision of the constitution shall **impair or limit** this power" to legislate for the comfort, health, safety and welfare of employes.

We submit that such a monstrous supposition is not to be entertained.

If it be asked what was the purpose of the amendment, we say that we think it clear that it was merely to declare that, subject to the fundamental rights which are inalienable, the powers therein enumerated were among those granted to the legislature, and that no other provision in the constitution should be held to limit such grant. In other words, the last clause of section 34 was not intended to abrogate or lessen in the slightest degree the protection of such fundamental rights as life, liberty and property, but was merely intended to protect the section against attack for want of granted power.

What we have said of section 34 applies with still greater force to section 36, for the latter section does not contain any clause which purports to make any other part of the constitution subordinate to it. As we have already pointed out in another part of this brief, the clause permitting laws to be passed for the conservation of natural resources must be construed in connection with the bill of rights, and when so construed, merely means that the subject of conservation is among those concerning which laws may be passed, but always with the same regard to the rights to life, liberty and property which have always existed under the constitution of the state.

If, therefore, the former mine-run law in this state violated the rights guaranteed by the Ohio constitution, then the present law is invalid for the same and greater reasons. The present law is subject to the same infirmities as the former and imposes additional burdens upon the operator and makes further invasions of the liberty of contract.

In conclusion, we submit that this Court should hold that the act in question violates both the constitution of the United States and the constitution of Ohio, and that the District Court erred in refusing to grant an interlocutory injunction.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 513.

RAIL AND RIVER COAL COMPANY,

APPELLANT,

VS.

**GALLACE D. YAPLE, MATTHEW B. HAMMOND
AND THOMAS J. DUFFY, AS MEMBERS OF
AND CONSTITUTING THE INDUSTRIAL COM-
MISSION OF OHIO,**

APPELLEES.

**MOTION OF APPELLEES TO AFFIRM, AND BRIEF
OF ARGUMENT IN SUPPORT THEREOF.**

MOTION.

Appellees move to affirm the above entitled cause, being
case number 513, October Term, 1914, on the ground that
it is manifest that the questions upon which the decision
of the case depend are so frivolous as not to need further
argument.

TIMOTHY S. HOGAN,
Attorney General of Ohio, and Attorney for Appellees.

JAMES I. BOULGER,

CLARENCE D. LAYLIN,

ROBERT M. MORGAN,

Of Counsel for Appellees.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION.

Appellant filed its bill in the District Court of the United States for the Northern District of Ohio, Eastern Division, seeking to enjoin the enforcement of an act of the General Assembly of the State of Ohio, hereinafter quoted, entitled, "An Act to regulate the weighing of coal at the mines."

Pursuant to section 266 of the Judicial Code the cause was heard by Honorable John W. Warrington, Circuit Judge, Honorable John E. Sater, District Judge, and Honorable John M. Killits, District Judge, upon the prayer for an interlocutory injunction. The District Court, so constituted, denied the injunction. Its opinion is found in the record at pages 15 to 22 inclusive, and is reported in 214 Federal, 273.

Thereupon, an appeal to this court was perfected pursuant to section 266 of the Judicial Code. Application for a temporary restraining order was made to Mr. Justice Day, and by him refused. Thereupon appellant filed a motion in this court for a temporary restraining order, which was considered on briefs and denied by the court.

That the merits of this case were quite fully presented to this court upon the motion for a temporary restraining order is one of the considerations which have influenced us to file this motion.

As we see it, the questions on which the decision of this cause depended are so frivolous as not to need further argument, within the meaning of the fifth paragraph of Rule 6 of this court, because the main question is settled absolutely by a recent decision of this court, and because

the collateral questions involve principles that are perfectly well established.

The act which appellant assails is twice quoted in the record (pages 12 and 15); but for the convenience of the court we insert it here in full:

"Section 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted."

"Section 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state."

"Section 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been op-

erating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission."

"Section 4. Said industrial commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof."

"Section 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof."

"Section 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars."

"Section 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days, he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of

a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

The foregoing legislation does not stand in need of elaborate analysis. Its primary and controlling purpose is, of course, to compel the operators of coal mines to compensate their employes if paid by weight on the basis of the entire weight of the product mined by them as it is brought to the surface in the mine car. It prohibits the use of the device known as the "screen", which is an appliance used for the purpose of separating what is known as lump coal from what is known as slack and other finer grades, for the purpose of reducing or diminishing the total weight of the contents of the car and basing the compensation of the miner upon such reduced weight. In other words, it effectively prohibits the paying of miners and loaders of coal on what is known as the "screened coal" basis, and enjoins the use of what is known as the "mine-run" basis of compensation.

To this extent the Ohio statute is practically identical with the Arkansas law, considered by this court in *Meegan v. Arkansas*, 211 U. S., 537. The entire statute involved in that case is quoted in the opinion of Mr. Justice DAY at page 543. For our purpose the following extract thereof is sufficient:

"It shall be unlawful for any * * * operator of coal mines * * * employing miners at bushel or ton rates, or other quantity, to pass the out-put of coal mined by said miners over any screen or any other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of wages fixed by the laws of Arkansas; * * * and the coal

sent to the surface shall be accepted or rejected; and if accepted shall be weighed in accordance with the provisions of this act * * *."

At a glance, it is apparent that in so far as the prohibition of the use of the screen for the purpose of diminishing the weight of the product for which compensation shall be paid, is concerned, and in so far as the compulsory use of the "mine-run" method or basis of compensation of employes, as against any other method based on *weight* or *measure*, is concerned, the Ohio act is the same as the Arkansas law.

In *McLean v. Arkansas*, *supra*, the constitutionality of the Arkansas law was sustained. We need not quote from the decision of Mr. Justice Day; but as a matter of logic it follows, we think, that the decision itself establishes the rule that as against any of the guarantees of the amendments of the Federal Constitution, a state, exerting its police power, has the right to enact legislation of this sort, and, correspondingly, to restrain the exercise of the individual's liberty of contract.

McLean v. Arkansas has been frequently cited with approval in more recent opinions of this court. (See *Williams v. Arkansas*, 217 U. S., 87; *Engel v. O'Malley*, 219 U. S., 138; *C. B. & Q. R. R. Co. v. McGuire*, 219 U. S., 569; *Quong Wing v. Kirkendall*, 223 U. S., 62; *Schmidinger v. Chicago*, 226 U. S., 589; *Bayrett v. Indiana*, 289 U. S., 29.)

Therefore, we say that the question of the power of the State of Ohio to enact into law a policy of the kind exemplified in the central and principal features of the legislation now under review, is at this time so frivolous as not to need further argument.

But before leaving this point we call the court's attention to the fact that the decision in *McLean v. Arkansas* was placed by Mr. Justice Day partially upon conditions disclosed in a public inquiry conducted by an industrial commission authorized by act of Congress. (See pages 549 and 550, opinion in *McLean v. Arkansas*.)

Ohio was not content to rest her legislation upon the results of the official investigation referred to by Mr. Justice Day. Proceeding with the utmost deliberation, the legislative branch of her government directed a similar and independent inquiry into the conditions of coal mining to be made, and enacted the present law in the light of conditions shown by that inquiry, and in accordance with the suggestions made by the commission which conducted the investigation. We refer the court to the report of the Ohio Coal Mining Commission to the Governor of Ohio, copies of which are on file with the clerk.

The main question being shown to be, as we think, frivolous within the contemplation of the court's rule, we pass to such collateral questions as may be involved.

SECTIONS 2 AND 3 OF THE ACT.

Appellant's counsel have always insisted that there are questions, necessary to the decision of this cause, which are not determined by *McLean v. Arkansas*. Some of these questions are alleged to arise under the constitution of the State of Ohio. All that we care to say with respect to them can be brought within a very small compass and will be postponed to a later portion of this brief.

Of purely federal questions, appellant's counsel claim to have two, which they say are not disposed of by *McLean v. Arkansas*. They may be stated as follows:

1. Sections 2 and 3 of the Ohio act, imposing upon the Industrial Commission of Ohio, the function of determining the percentage of impurities unavoidable in the proper mining or loading of the contents of mine cars of coal in the several mines of the state, and (in the event of failure of employer and employees to agree) the percentage of fine coal allowable in the output of a coal mine, constitute other and further invasions of the liberty of contract not necessitated by the main policy of the law, and constitute an unwarranted interference with a private business and the right of its proprietors to conduct it as they severally see fit.

2. The penalties imposed upon operators of coal mines by section 6 of the act are so heavy as to intimidate the operators and thus to preclude them from suffering their consequence and thus testing the constitutionality of the act in the Ohio courts.

We entertain the view that both of these alleged questions are so frivolous as not to require further argument.

In making the first of them appellant's counsel have in previous argument pointed out that the Arkansas statute, upheld in *McLean v. Arkansas*, expressly reserved to the employer the right to accept or reject a car load of coal as it came from the mine, and that in exercising this right the operators would retain to themselves control over the quality of the product of their own mines.

Appellant's counsel then call attention to the admitted fact that under the Ohio law the operators are not at liberty to accept or reject a mine car load of coal because of its failure to conform to quality specifications of their own free choice; but that they must pay their operatives on the basis of all the contents of the mine car unless the

same fails to conform to specifications not of their own choosing but, with respect to the percentage of impurities, those determined by the Industrial Commission, and with respect to the percentage of fine coal, those agreed upon between the operator and his employees; or in the absence of such agreement, those fixed by the Industrial Commission of Ohio.

So, counsel say, the Ohio law differs essentially from the Arkansas law in such a way as to bring the present case out of the controlling effect of *McLean v. Arkansas, supra*, and to make the former unconstitutional.

We discussed these features of the Ohio law somewhat fully in our memorandum opposing the motion for a restraining order, but for the convenience of the court restate our position here.

Our contentions with respect to the provisions of sections 2 and 3 of the Ohio law are as follows:

1. They constitute appropriate and necessary incidents to the main objects of the law.
2. The alleged invasion of the liberty of contract and interference with the right of management of a private business, which they are said to embody, is illusory and cannot be complained of by the appellant and those whom it represents.

We have referred to the report of the Ohio Coal Mining Commission, copies of which are on file. We direct the court's attention to pages 51 to 58 inclusive, of said report, and to the second conclusion of the Commission at page 59. We deem it proper to quote from these pages as follows:

"The third objection of the operators to the mine-run system is that there would be a great increase in

the amount of impurities mixed with the coal and brought out of the mine under such a system, which would greatly deteriorate the quality of the coal if it were sold on a mine-run basis and which would increase very much the cost of operating the mine if the coal were cleaned before it was sold.

In the minds of the members of this Commission, this is the strongest objection to the adoption of the mine-run system by law in Ohio, unless there can be included in the law ample safeguards for the operators.

* * * * *

All parties agree that the place to remove these impurities is in the mine, at the working places. * * * All parties agree that it is not possible to remove all of the impurities in the coal inside of the mine. The smaller particles of dirt have become mixed with the fine coal and could not be removed without a tedious sorting by hand, which it is not practicable to do. Other portions of the dirt adhere to the coal or are found imbedded in the large lumps. If these impurities are of the nature of slate or sulphur bands of considerable size, it is the business of the miner to break the lump in order to remove them. If they are only thin partings, they are left in, for the coal would be depreciated more in value by removing them than by leaving them.

Some of the impurities are hard to detect in the mine with only the faint light shed by the miner's lamp. This is especially true of the inferior grades of coal, which in appearance resemble more or less the other coal. We do not mean to say that any considerable amount of this coal, or other impurities, need escape detection by a careful man who has had some little experience in a coal mine. If any considerable amount of impurities are loaded out it can only have been done intentionally or through carelessness on the part of the miner. It is not, however, practicable, or even possible, to remove all the impurities in the mine."

Thereupon the Commission, as the court will observe, discuss various methods of eliminating impurities from the product brought to the surface. The quotation which we have made is from pages 51 and 52 of the Commission's report. Near the bottom of page 53 is found the following:

"The miners claim that under a mine-run system of payment, they would clean their coal as well as they now clean it under the screened coal system. They claim that it is always to the interest of the miner to bring out his coal in the best possible condition, and that the trained miner takes a pride in his work and therefore would be unwilling to load dirty coal."

These same arguments were made before the former commission, which sat on this subject, and they did not greatly impress that commission. Neither do they greatly impress the members of this commission. It may be admitted that the majority of miners do endeavor to perform their labor in a workmanlike manner and that they would continue to do so, at least for a time, under a mine-run system of payment."

After reviewing various *a priori* arguments which were made to them, the commission stated the substance of what is characterized as the most reliable testimony heard by them relative to the experience of other states, including Illinois and Arkansas, under the so-called "mine-run" system. Concluding at page 58 they say:

"Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface, unless some way were found to protect the operator from the carelessness or indifference of the miner."

The recommendation of the commission on this point, found at page 59 of their report, is in line with the lan-

guage above quoted. The situation then may be described as follows:

The experience of states like Illinois and Arkansas under the "mine-run" system had been such, as established by testimony taken before the Ohio Commission, as to show conclusively that over-production of impurities was a natural and inevitable result under the "mine-run" system as it existed under laws like those of Arkansas. That is to say, when the miners and operators were left free to contract with respect to a standard of purity, as they had been under the Arkansas law, the practical result had been a product unduly full of impurities. The production of impure coal was deemed to be a public evil, justifying legislation for its removal.

In other words the main legislative policy embodied in the mine-run law, when put into effect, resulted in incidental evils, unless surrounded by safeguards for the avoidance of such evils. The means chosen by the Ohio legislature, adopting recommendations of the Ohio Mining Commission for the obviation of such incidental detriment, are those embodied in sections 1 and 2 of the Ohio law. First, there is a prohibition directed to the laborer against bringing out of the mine a product containing a percentage of impurity higher than a given standard. Second, the standard was to be fixed by the Industrial Commission of Ohio, an administrative agency of the state, in accordance with the rule laid down in the statute itself, viz., the commission should ascertain for each mine the percentage of impurity *unavoidable* in the proper mining of coal.

At this point we must call attention to the fact that the act now before the court is not expressive of the complete legislation of Ohio applicable to the subject matter.

The Industrial Commission's order or determination is not final, but as held by the lower court, either party may petition for, and obtain, a hearing before the commission, and may thereafter have a speedy review of its action by the Supreme Court of the state. The statutes disclosing this are found in 103 Ohio Laws, page 95, and may be quoted in abstract as follows:

"Section 25. All orders of the industrial commission of Ohio in conformity with law shall be *prima facie* reasonable and lawful; and all such orders shall be valid and in force and *prima facie* reasonable and lawful until they are found otherwise in an action brought for that purpose pursuant to the provisions of section 41 of this act, or until altered or revoked by the commission."

"Section 27. (1) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the commission in the manner provided in this act.

• • • • •

"(3) Upon receipt of such petition, if the issues raised in such petition have theretofore been adequately considered, the commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issues raised, the commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the petitioner and to such other persons as the commission may find directly interested in such decision."

"(4) Upon such investigation if it shall be found that the order complained of is unlawful or unreasonable the commission shall substitute therefor such order as shall be lawful and reasonable."

"Section 38. Any employer or other person in interest being dissatisfied with any order of the com-

mission may commence an action in the supreme court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the supreme court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. * * *

"Section 39. (1) If upon the trial of such action it shall appear that all issues arising in such action have not theretofore been presented to the commission in the petition filed as provided in section 27 of this act, or that the commission has not theretofore had ample opportunity to hear and determine any of the issues raised in said act, or has for any reason not in fact heard or determined the issues raised, the court shall, before proceeding to render judgment, unless the parties to such action stipulated to the contrary, transmit to the commission a full statement of such issues not adequately considered and shall stay further proceedings in such action for fifteen days from the date of such transmission and may thereafter grant such further stay as may be necessary."

In this same connection we refer to section 2 of Article IV of the Ohio Constitution, which, without quoting it, we may assure the court authorizes legislation such as that above quoted, providing for a direct appeal from the decision of an administrative body to the Supreme Court of the state.

In this manner the legislature of Ohio has effectually safeguarded its legislation against incidental evils such as experience has shown flow from the operation of a law like that of Arkansas. The law of Arkansas prohibits the screening of coal before it is weighed, and requires acceptance or rejection before weighing; consequently it places upon the operator the unsatisfactory burden of accepting or rejecting the coal in the mine car. Either the

operator will reject cars upon a seemingly arbitrary basis and thus engender disputes with his employes or he will accept all the coal and thus deteriorate his product.

The Ohio statute, on the other hand, does not prohibit the screening of the coal before it is weighed, but on the contrary clearly implies that the quality of the coal shall be definitely ascertained before the basis of compensation is fixed. We see, therefore, why it is that the type of "mine-run law" exemplified in the Arkansas statute results practically in an over-production of impurities and why also the differences between the Ohio law and the Arkansas law constituting as they do intended safeguards against the existence of such evils, must necessarily be effectual as such.

As to section 3 we may say that although the Ohio Coal Mining Commission deals with the problem of over-production of fine coal in other portions of its report, not hereinbefore quoted, and although the provision respecting fine coal differs slightly from that respecting over-production of impurities, the same general principles apply. That is to say, a "mine-run law" of the kind exemplified in the Arkansas legislation operates practically so as to result in the production of an undue proportion of fine coal which is an inferior commercial product and decreases the value of the whole product of the mine. The evidence supporting this conclusion and the reasons why it is true are both set forth in the report of the commission. That being the case another evil incidental to the operation of a "mine-run law" is encountered, and is attempted to be safeguarded in substantially the same way as with respect to the evil of the over-production of impurities.

The first point which we make in this connection, as above stated, may then be reduced to two propositions which may be stated thus:

(a) Conditions resulting in the general production of impurities deleterious to the quality and value of a commodity of general use constitute public evils, which a state, in the exercise of its police power may remedy by appropriate measures.

(b) Where a state law aimed at one public evil, and valid as a measure designed to cope with that evil, will result in other evils of a different character which also constitute in and of themselves proper objects of the exercise of its police power, such state has the right to provide against such incidental evils by additional requirements safeguarding against their existence, and such right exists as an incident to the power to enact the main law.

(a) We need not cite numerous authorities upon the point that a state in the exercise of its police power may directly or indirectly fix standards of purity as well as standards of quantity, subject to which commodities of general consumption must be sold.

Freund on Police Power, section 32;
Schmidinger v. Chicago, 226 U. S., 587.

True, the Ohio law does not fix a standard for the *sale* of coal as a commodity. But the difference in principle between the production of the public from frauds by means of a regulation effective only when the commodity is sold or offered for sale, and that protection which would be offered to the public by regulations affecting the quality of a product at the source of its production, is not essen-

tial. If there is a difference it bears upon the evil to be remedied and not the method by which the evil is attacked. That is to say, the laws governing the standard of purity of commodities directly, as subjects of sale and consumption, aim only to protect the public from the consequence of fraud and imposition; whereas laws regulating the standard of production as such have the same effect, and in addition may obviate other public evils clearly subject to the police power. So, it appears from the report of the Ohio Coal Mining Commission that the incidental production of an undue amount of impurities and an unwarranted proportion of fine coal under a mine-run system of compensating workmen, is a source of dissatisfaction, discontent and fraud as between employers and employes. The main law being justified partially on the ground of its tendency to promote harmonious relations of capital and labor (*McLean v. Arkansas*, *supra*, p. 350), these ancillary features which provide a method of avoiding such disputes which may possibly arise under the mine-run system itself are also to be justified on the same ground.

There being, then, at least two public evils arising out of the lack of a standard of purity and fineness in the production of coal under a mine-run system, viz., the quality of the product from the standpoint of the public as consumers, and the likelihood that the absence of a standard will engender industrial warfare by becoming a prolific cause of dispute between the employers and employes, the exercise of the police power in the familiar manner, by fixing such standards, is fully sustained.

(b) The principle here is merely the well established one of implied or incidental power. If the police power of

the state extends generally to a subject matter, as in this case, it extends to regulating the method of weighing coal at the mines as a basis for the compensation of employes, there exists as incidental to this power, the additional power to provide safeguards against corollary evils; and in exercising such incidental power the legislature may, to the extent necessary, interfere with the conduct of a private business.

Interstate Commerce Commission v. Goodrich Transportation Co., 224 U. S., 192;
Flint v. Stone Tracy Co., 220 U. S., 107.

2. The alleged deprivation of the liberty of contract, which sections 2 and 3 of the Ohio law are said to work, is illusory. It is a well settled rule of this court that one who claims the protection of the federal constitution, as against a state law, must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the federal constitution.

Plymouth Coal Co. v. Pennsylvania, 232 U. S., 532
and cases cited by Mr. Justice PITNEY at page
545.

In this case the *employers*, represented by appellant, claim that the act is unconstitutional because it precludes the fixing of standards of rejection, or standards of quality by private contract. This is, of course, not strictly true with respect to the percentage of fine coal which the law expressly makes subject to agreement. (Section 3). We point out, however, that the contention must fail as to the operators for the reason that there is committed to the Industrial Commission, under the law, the function of ascertaining the *unavoidable* percentage of impurity for

a given mine and the *allowable* percentage of fine coal. Whatever determination the Industrial Commission may make in the premises is subject to review, and it is at least true that the statutory proceedings are characterized by due process of law. The commission cannot fix an arbitrary standard, but must fix one conformable to the law itself. The law itself does not fix an arbitrary standard, but as the court below well said, "the operator, if given the unrestricted right of contract, could do no more" than the law requires the Industrial Commission to do for him.

Therefore, we repeat that as to the operators the alleged deprivation of liberty of contract growing out of the provisions of sections 2 and 3 of the Ohio law is illusory and had no real existence. Of course on principles established by decisions already cited the operators cannot complain of any disadvantages which may exist from the standpoint of the employees.

PENALTIES.

We submit that in the light of decisions like *Flint v. Stone Tracy Co.*, *supra.*, *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, *Grand Trunk Ry. Co. v. Michigan Railroad Commission*, 231 U. S., 457 and the *Ohio Tax Cases*, 232 U. S., 576, the point which appellant's counsel make respecting the alleged unconstitutionality of the penalty sections is not involved in the case at bar, and is therefore frivolous within the meaning of the court's rule. However, we may step aside to remark that a minimum penalty of \$300 for each separate offense is not an excessive one solely by reason of the fact that one day's violation of the law by appellant would subject it to pen-

alties aggregating \$800,000. If the fine were \$50 instead of \$300 the aggregate would still be in excess of \$130,000 for a single day's violation on the part of the appellant. That is to say, the fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum. The court below, while holding that the question was not in the case, was of opinion that the penalties were not excessive.

We might add to what we have said respecting purely federal questions that *Plymouth Coal Company v. Pa., supra*, is definite authority upon the point that the delegation of the determination of questions of the character mentioned in sections 2 and 3 of the Ohio law in the first instance by an administrative tribunal, and with respect to each mine to itself, is not violative of the amendments to the federal constitution.

THE OHIO CONSTITUTION.

Appellant in its bill complains of the Ohio act that it violates the constitution of Ohio in several respects. One of these complaints is the familiar one respecting alleged delegation of legislative power. It is scarcely necessary for us to notice this contention in view of the explicit rule of action laid down by the law itself for the guidance of the Industrial Commission, and in view of the multitude of authorities available on the question, some of which are cited by Mr. Justice PITNEY in his opinion in *Plymouth Coal Co. v. Pa., supra*.

In fact, we submit that the very fact that the orders of the Industrial Commission of Ohio are subject to review

by the Supreme Court of the state of itself disposes of the thought that the power which is committed to that commission is legislative. If the commission can make law then the court would be bound by its orders.

Another, and the only other point made under the Ohio constitution which we deem necessary to mention in this brief involves the whole act. It is asserted that because of the decision of the Ohio Supreme Court in the case of *In re Preston*, 63 O. S., 428, the present law must be regarded as violative of the constitution of Ohio.

There are differences between the statute passed upon in the ~~Preston~~ ^{Preston} case and the one involved in the instant case which might form the basis of an interesting study, but we think that the Preston case can no longer be regarded as stating the law of Ohio, because since its rendition the constitution of the state has been materially amended. We call attention to sections 34 and 36 of Article II of the Ohio Constitution, as adopted November, 1912, and effective January 1st, 1913, prior to the enactment of the law involved in this case. These sections are partially quoted in the opinion of the court below but for convenience we quote them here.

"Section 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employes; and no other provision of the constitution shall impair or limit this power."

"Section 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

It is, of course, obvious, as the District Court held, that the act complained of in the case at bar must have been

passed in the exercise of the special powers conferred upon the legislative department by these sections.

For other points raised by appellant under the Ohio constitution we refer this court to the opinion of the District Court.

We submit that all questions raised under the Ohio constitution and necessary to the determination of this case are so frivolous as not to require further argument.

CONCLUSION.

We think we are justified in asking the court to affirm this case without further argument.

First, because the Ohio law, the constitutionality of which is in issue, has for its main purpose the same object, and for its principal effect, the same result, as the Arkansas statute upheld by this court in *McLean v. Arkansas*, *supra*.

Second, because the requirement that the unavoidable percentage of impurities and the allowable percentage of fine coal in the proper mining of coal in the several mines in the state be ascertained and determined by the Industrial Commission of Ohio, subject to direct judicial review, for the purpose of fixing a standard of rejection and a basis of "docking" (section 7 of the act) has such an obvious relation to the principal purpose of the act as that the power to enact the remainder of the act will include, as incidental, that to pass these sections themselves.

Third, because the method of the state's exercise of its police power in the delegation of these functions to the Industrial Commission does not involve any real depriva-

tion of the constitutionally guaranteed rights of the operators.

Fourth, because the claim of appellant, based upon the amount of the penalty is negatived by numerous decisions of this court; and, last, because the points made by appellant under the constitution of Ohio are manifestly of no weight.

Therefore, we respectfully ask the court to grant the prayer of our motion, and in any event to order this case transferred for hearing to the summary docket, as authorized by paragraph sixth of the sixth rule.

Respectfully submitted,

TIMOTHY S. HOGAN,

Attorney General of Ohio, and Attorney for Appellees.

JAMES I. BOULGER,

CLARENCE D. LAYLIN,

ROBERT M. MORGAN,

Of Counsel for Appellees.

**NOTICE OF MOTION, ACKNOWLEDGMENT OF
SERVICE OF SAME, AND COPY OF BRIEF.**

SUPREME COURT OF THE UNITED STATES.

October Term 1914.

Rail and River Coal Company, Appellant, vs. Wallace D. Yapple, Matthew B. Hammond, and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio, Appellees. No. 513.

September 17th, 1914.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, Attorneys at Law, Western Reserve Building, Cleveland, Ohio. :

Gentlemen: You are hereby notified that a motion, and a brief, copies of both of which are enclosed herewith, will be filed in the Supreme Court of the United States, and that said motion will be submitted to said court on Monday, October 12th, 1914.

This letter is sent to you in duplicate, and we ask you kindly to acknowledge service upon the blank, and return one of the copies for our use under the rule.

Yours very truly,

TIMOTHY S. HOGAN.

Attorney General of Ohio, and Attorney for Appellees.

JAMES L. BOULGER,

CLARENCE D. LAYLIN,

ROBERT M. MORGAN,

Of Counsel for Appellees.

Service of the above notice, and a copy of the brief of appellees on the motion to affirm in the above entitled case is acknowledged this eighteenth day of September, 1914.

HOYT, DUSTIN, KELLEY MCKEEHAN & ANDREWS,

Attorneys for Appellants.

A. C. DUSTIN,

Of Counsel.

No. 513

FILED

OCT 10 1914

JAMES D. MAHER

CLERK

In the Supreme Court of the United States

October Term, 1914.

RAIL & RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, et al.,
Appellees.

**BRIEF OF APPELLANTS IN OPPOSITION TO MO-
TION OF APPELLEES TO AFFIRM.**

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Appellant,
Cleveland, Ohio.

A. C. DUSTIN,
Of Counsel.

No. 1104.

In the Supreme Court of the United States

October Term, 1914.

RAIL & RIVER COAL COMPANY,

Appellant,

vs.

WALLACE D. YAPLE, et al.,

Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM.

This suit was begun in the court below by the filing of a bill to restrain the members of the industrial commission of Ohio from putting into effect the so-called Mine Run Law, which is printed on pages 12 to 15 of the record in this case. The appellant's application for an interlocutory injunction having been denied, an appeal was taken directly to this court under Section 238 of the Judicial Code. The appellees now move to affirm the holding of the lower court on the ground that the questions on which the decision of the cause depends in this court are so "frivolous as not to need further argument."

If the appellees believe the appeal to this court to be frivolous, it is strange that an earlier discovery of that fact was not made. After the appeal was perfected to this court, an application was made herein in June, 1914, for a temporary restraining order, pending the hearing on the appeal, which was denied by this court, but no

point was made at that time (evidently the discovery had not been made) that the appeal was without merit. On the contrary, appellees' counsel devoted many pages of their printed brief arguing against the granting of such restraining order.

The decision of this motion does not depend upon the merits of the appellant's case, as they may be ultimately found upon final hearing. It may be that upon full and final argument this court may be convinced that the lower court was right. This motion, as we understand it, simply presents the question that this appeal is frivolous and without merit and that there is no question before this court, calling for an investigation and decision on the law.

It is to be noted that the questions involved in this appeal are solely questions of law with respect to the constitutionality of a statute of the State of Ohio. The bill filed below charges that the statute in question deprives plaintiff and others similarly situated of liberty and property without due process of law and denies to them the equal protection of the laws, which rights are guaranteed by Section 1 of Article Fourteen in amendment to the Constitution of the United States and by the Bill of Rights of the Constitution of Ohio. The bill sets forth the respects in which this statute deprives the plaintiff of its constitutional rights, and the decision of the lower court was upon the facts and allegations of this bill. The questions of law upon which the appellant claims the right to a full hearing before this Court are exactly the same as those presented and argued to the lower court, and an examination of the opinion of the lower court will indicate the importance and gravity of certain of those questions.

Evidently the district court were not of the opinion that the questions upon which their decision depended were frivolous and not worthy of argument before a court. The district court was composed of Judges Warrington, Killits and Sater, in accordance with the provisions of Section 266 of the Judicial Code. The argument was made on April 27, 1914, and the court had the case under advisement for more than three weeks, the opinion having been filed on May 20, 1914. The opinion comprises seven printed pages in the record, pages 15 to 22. Although we disagree with the conclusions reached by that court, the discussion in the opinion clearly shows that there are serious questions involved upon which the constitutionality of this statute depends. Had the claims on the part of plaintiff lacked any substantial merit and had they been frivolous, the court below would have disposed of the case upon the plaintiff's own argument and without the preparation of a detailed opinion.

Neither in the brief filed by the defendants' counsel in the district court nor in the oral argument was there ever the slightest indication of any claim that the plaintiff was abusing judicial process or occupying the time of the court with questions not worthy of argument, or with questions too frivolous to be called to the court's attention.

The appellees, to support their new claim that this appeal is frivolous, present a brief which, instead of tending to show in the slightest degree that the appeal is without merit, is taken up with a discussion of the merits themselves, thus indicating that there are arguable issues involved in the appeal. In fact, their brief covers twenty-one large typewritten pages, and is ap-

parently an endeavor to convince the court that the Mine Run Law is constitutional.

We will not trespass upon the time of the court by following appellees' brief in support of this motion to the effect that the court below decided the question correctly. Such an argument is of necessity upon the merits. It is enough to point out that there are questions here for discussion and decision.

The Mine Run Law which the appellant claims is unconstitutional regulates to some extent the coal industry of the State of Ohio. It provides in the first instance that every miner of coal, who is to be paid on the basis of weight, shall be paid for such mining according to the total weight of the coal contained within the mine car in which the coal is removed from the mine. The operator is prohibited from screening the coal to ascertain the amount to be paid such miner. A violation of this prohibition is made a misdemeanor punishable by a fine of not less than \$300 nor more than \$600 for each separate offense.

In addition to these provisions, there are added others which regulate the relations of the operators and their employees and the business of mining in general, as follows:

1. The industrial commission of Ohio is required to ascertain and determine the percentage of slate, dirt or other impurities, "unavoidable in the proper mining or loading of the contents of mine cars of coal" in the various mines of the state. The operator must accept every car of coal sent up by the miner or loader which conforms to the standard of product so fixed by the commission, and he must pay the miner or loader for the labor thereon on a mine-run basis.

It is made the duty of the miner and loader to mine and load coal conforming to or not falling below such standard. Mining or loading coal containing a greater percentage of impurity than that so fixed is made a misdemeanor punishable by fines varying from fifty cents for the first offense to a maximum of \$4.00 for the third offense if committed within three days from the first.

2. It is made the duty of the operators and the miners to agree upon the percentage of fine coal allowable in the output of the mine. If no such agreement is made, the commission is required, upon the request of either party, to fix such "allowable percentage of fine coal", which shall continue in force until otherwise agreed by the operators and employees.

3. Whenever the commission finds that the total output of fine coal for a period of a month exceeds the percentage which has been fixed by it, the commission is required to make and enforce such orders "relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by such industrial commission."

The appellees have shown no reason why the appellant should be deprived of a full hearing before this court in which we should have the opportunity to point out the necessary effect upon the coal mining industry of the provisions and regulatory features of the Mine Run Law to which we have referred; the extent to which these provisions regulate the relations of master and servant; the extent to which they regulate the private business of the coal operators; the vast damage and inconvenience which the enforcement of the act entails, and other respects in which the act operates to take away the constitutionally guaranteed rights of owners of coal mines

in this state and the employers of labor in connection therewith.

The coal mines affected by this law represent an investment of millions of dollars. The total tonnage of coal produced by these mines amounted in 1913 to upwards of 36,000,000 tons. Next to agriculture, the coal industry is the leading development of the natural resources of the state. In addition to this, the welfare of all the employees at the coal mines, who number upwards of 48,000, is directly affected by this act.

The serious manner in which the Mine Run Law affects the coal industry of the state is shown by the present idle condition of the Ohio mines. It is stated in the affidavit of Charles E. Maurer, filed in this court in support of the application for a temporary restraining order, that the failure of the operators and miners to agree upon a wage scale in April this year was due to the enactment of this statute. The loss to operators and employees in profits and wages, respectively, since April, already reaches an enormous total.

We do not think that the attempt on the part of our opponents to deprive us of a full hearing on the merits of such a serious and important case should be looked upon with favor by this Court.

It is asserted by the appellees that a prior decision of this court is controlling upon this appeal and makes further argument thereupon unnecessary. The case relied upon is McLean vs. Arkansas, 211 U. S., 537, where the Arkansas Mine Run Law was sustained; but the character, scope, operation and effect of the Ohio law are vastly and fundamentally different from those of the Arkansas act. The Arkansas act contained none of the regulatory features provided for by the Ohio act, except

that the operator who paid by weight was required to pay on a mine-run basis. There was no attempt, in the Arkansas act, to require the operator to pay for any coal which he did not want mined; there was no delegation to a commission of the power to fix the quality of the product of his mine; there was no attempt to regulate the relations of master and servant further than the necessities of the mine-run system required; the power of the operator to agree with his employee as to the quality of coal to be produced was not taken away; no commission was vested with power to issue orders relative to the production of coal at his mine. As the court points out in the opinion in that case, in all respects other than the requirement of payment on the mine-run basis, the operator was left free to conduct his business as he chose without dictation or hindrance from any one and without regulation of any kind whatsoever.

In addition to the questions which we have above briefly referred to, upon which we claim the appellees have shown no reason why we should be denied a full hearing, there are others involving the construction of certain provisions of the Constitution of Ohio. Some of these provisions are in the form of amendments which went into effect in January, 1913. Their full scope and effect, and their application to statutes such as the one in question, have never been passed upon by any court. There is no foundation whatsoever for the appellees' claim that the questions we raise under these amendments are frivolous or that we are foreclosed from raising the same by prior decisions of this court. We claim that the lower court misconstrued these provisions and misconceived their purposes, and we desire a full hearing before this court to discuss these questions in a manner deserving of their importance.

Furthermore, the effect upon the validity of the Mine Run Law of the penalties therein provided to be imposed upon the operators for the violations of the act raises questions which, in our opinion, were not considered fully by the lower court. Upon these questions also further argument is necessary.

In view of the foregoing considerations, we submit that the rule of this court, which the appellees attempt to invoke, has no application to this case, where the questions are numerous, of great importance and of novel impression. The case is clearly not within the rule of *Swope vs. Leffingwell*, 105 U. S., 3, where the court granted a motion to affirm on the ground that the sole question involved had been squarely decided in a former case.

If the appeal taken in the case at bar were frivolous, it would follow that counsel for the appellant should have known that fact, and that their motive must have been other than that of obtaining, in good faith, a final judicial determination of the appellant's rights under the Constitutions of the United States and the State of Ohio. The brief of appellees, however, does not intimate or indicate that the appellant filed its appeal for the purposes of delay or any improper motive whatsoever.

Certainly the appellant has been prompt in seeking to obtain a final determination upon the validity of the statute in question. Upon the expiration on April 1, 1914, of the existing contracts of employment between the operators and the coal miners, the appellant within a few days filed its bill in the lower court, and at the same time applied for an interlocutory injunction, a hearing upon the same being had on April 27th. The order overruling the application was entered May 23, 1914,

and within five days thereafter an appeal was taken to this court. In view of the dormant condition of the coal mines, it was imperative upon the operators to be prompt in seeking their remedy. The good faith of the appellant in presenting its claims under the Constitutions of the United States and of Ohio to the court below and to this court, and its freedom from delay, or other improper motive, cannot be doubted. It is not seeking, for sinister reasons of its own, to call the attention of this court to questions not worthy of being presented to a tribunal of justice. The case is, therefore, not within the rule of *Micas vs. Williams*, 104 U. S., 556; *Blythe vs. Hinckley*, 180 U. S., 333, and *Chanute City vs. Trader*, 132 U. S., 210, where motions to affirm were granted either on the ground that the questions presented were so obviously frivolous as not to merit the court's further attention, or on the ground that it appeared that the appeal or writ of error was prosecuted for the purposes of delay.

We, therefore, respectfully submit that the appellant should be granted a full hearing in respect of its constitutional rights and that the motion of appellees should be overruled.

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Appellant,
Cleveland, Ohio.

A. C. DUSTIN,
Of Counsel.

19
IN THE

FILED
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JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 518.

RAIL AND RIVER COAL COMPANY,

Appellant,

vs.

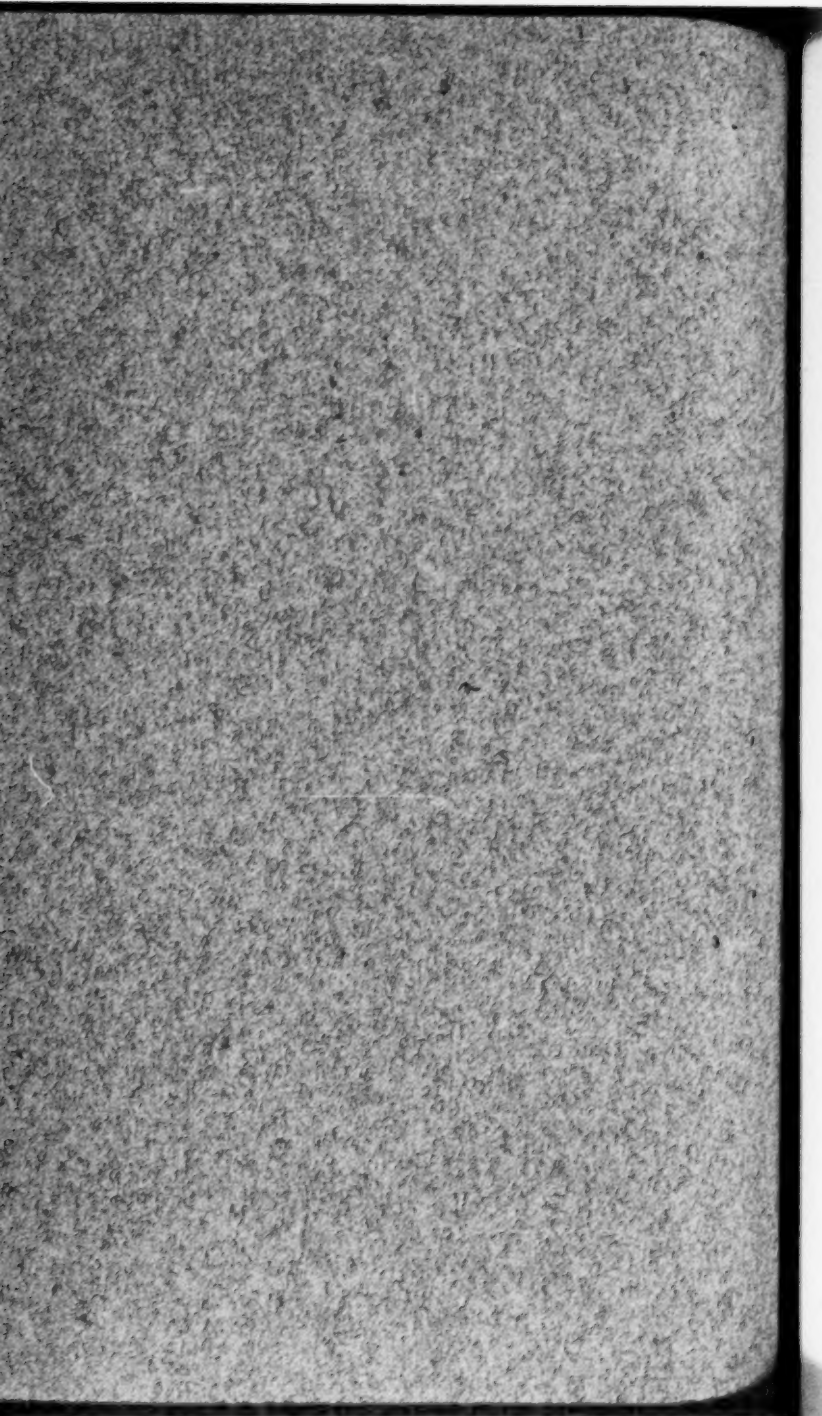
WALLACE D. YAPLE, MATTHEW B. HAMMOND
AND THOMAS J. DUFFEY, AS MEMBERS OF
AND CONSTITUTING THE INDUSTRIAL COM-
MISSION OF OHIO,

Appellees.

BRIEF OF APPELLEES.

Timothy S. Hogan,
Attorney General of Ohio.

Clarence D. Laylin,
Robert M. Morgan,
James I. Boulger,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 513.

RAIL AND RIVER COAL COMPANY,

Appellant,

vs.

WALLACE D. YAPLE, MATTHEW B. HAMMOND
AND THOMAS J. DUFFEY, AS MEMBERS OF
AND CONSTITUTING THE INDUSTRIAL COM-
MISSION OF OHIO,

Appellees.

BRIEF OF APPELLEES.

STATEMENT.

The case has been well stated in the brief of appellant.

ARGUMENT.

The Main Object of the Ohio Law and the Principal Means of Accomplishing that Object Embodied Therein, are Unquestionably Within the Police Power of the State, so Far as the Fourteenth Amendment of the Constitution of the United States is Concerned.

Obviously, the primary and controlling purpose of the Ohio act, which is quoted in full at page 12 of the record, is disclosed by Sections 1 and 6 thereof, which, broadly speaking, require that every mine and every loader of coal in any mine in Ohio, who, under the terms of his employment, is to be paid on the basis of weight, shall be paid according to the total weight of all coal contained in the mine car in which the same shall have been removed out of the mine; and that any employer of such miner or loader who passes any part of the contents of the mine car over a screen or other device for the purpose of ascertaining the amount to be paid to such miner or loader, whereby the total weight of the contents of the car shall be reduced or diminished, shall be punished in a certain way. In a word, the law to this extent, so to speak, compels the operators of coal mines to compensate their employes, if paid by weight, on the basis of the entire weight of the product mined; and prohibits the use of any device for the purpose of reducing or diminishing the total weight of the contents of the car, and basing the compensation of the miner on such reduced weight.

To this extent the Ohio statute is practically identical with the Arkansas law, considered by this court in *McLean v. Arkansas*, 211 U. S., 537. The entire statute involved in that case is quoted in the opinion of Mr. Justice Day at page 543. For our purpose the following abstract thereof is sufficient:

“It shall be unlawful for any * * * operator of coal mines * * * employing miners at bushel or ton rates, or other quantity, to pass the out-put of coal mined by said miners over any screen or any other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of wages fixed by the laws of Arkansas; * * * and the coal sent to the surface shall be accepted or rejected; and if accepted shall be weighed in accordance with the provisions of this act * * * .”

At a glance it is apparent that in so far as the prohibition of the use of the screen for the purpose of diminishing the weight of the product for which compensation shall be paid, is concerned, and in so far as the compulsory use of the “mine-run” method or basis of compensation of employes, as against any other method based on **weight** or **measure**, is concerned, the Ohio act is the same as the Arkansas law.

In *McLean v. Arkansas*, *supra*, the constitutionality of the Arkansas law was sustained. We need not quote from the decision of Mr. Justice Day; but as a matter of logic it follows, we think, that the decision itself establishes the rule that as against any of the guarantees of the amendments of the Federal Constitution, a state, exerting its police power, has the right to enact

legislation of this sort, and, correspondingly, to restrain the exercise of the individual's liberty of contract.

McLean v. Arkansas has been frequently cited with approval in more recent opinions of this court. (See Williams v. Arkansas, 217 U. S., 87; Engle v. O'Malley, 219 U. S., 138; C. B. & Q. R. R. Co. v. McGuire, 219 U. S., 569; Quong Wing v. Kirkendall, 223 U. S., 62; Schmidinger v. Chicago, 226 U. S., 589; Barrett v. Indiana, 229 U. S., 29).

It is interesting to note in this immediate connection that Mr. Justice Day in his opinion in the McLean case comments upon facts established in a public inquiry conducted by an industrial commission, authorized by act of Congress. He says at page 549:

"Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 19, 1898. * * * In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the 'run of mine' system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between operators and the miners. This condition was testified to have been the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens

had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as basis of paying the miner's wages.

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state."

As the whole opinion shows, the conditions disclosed by the report of the congressional industrial commission do not constitute, in the mind of Mr. Justice Day, the only grounds on which the constitutionality of the Arkansas legislation could be upheld. We call particular attention to this portion of the opinion in the McLean case, however, for the reason that Ohio was not content to rest her legislation upon the results of the official investigation referred to in the opinion in the McLean case. Proceeding with the utmost deliberation, her legislature directed a similar inquiry to be made into the conditions of coal mining in the state (see 103 O. L., 981). Such an investigation was conducted by a commission appointed for that purpose, which made a report to the governor of the state, analyzing the testimony taken by it and recommending specifically the enactment, among other laws, of the very act assailed in this case. Copies of the report, which is known as that of the Ohio Coal Mining Commission, are on file with the clerk of this court; and we shall have occasion to

call particular attention to certain facts found by the commission and set forth therein, in the course of this brief; if the court should desire to make use of the report generally in the consideration of the case, we refer to appellees' memorandum opposing the motion for a restraining order, also on file with the papers, wherein, at pages 10 and 11 thereof, will be found an analysis of the report which may serve as a convenient index to its contents.

In so far, then, as this case involves the power of the State of Ohio, as against the limitations of the Federal Constitution, to enact into law a policy of the kind exemplified in the central and principal features of the legislation now under review as we have hereinbefore described them, we submit, with confidence, that such power is established beyond question by the decision in *McLean v. Arkansas*. Indeed, careful examination of the able brief of appellant's counsel will disclose that they make a tacit admission, at least, that this is the case, and that if the constitutionality of the Ohio law can be successfully assailed, the attack must be made upon those features thereof which differ from those of the Arkansas law sustained in the *McLean* case. This is the position to which appellant is driven and counsel have apparently accepted the situation.

Those Features of the Ohio Law in Respect of Which it Differs from the Arkansas Law, viz., the Provisions of the Latter Part of Section 1, and those of Sections 2 to 5 Inclusive and Section 7 of the Ohio Law, do not Violate the Fourteenth Amendment of the Constitution of the United States.

The logic of the situation, as we have attempted to describe it, has sent appellant's counsel, in the effort to find grounds of attack upon the Ohio law, upon a search for **differences** between that and the Arkansas law sustained in the McLean case; and having found such differences, which indubitably exist, they discover, of course, that in the conventional sense, at least, the provisions of the Ohio law in respect of which it differs from the Arkansas law, constitute restraints upon the conduct of individuals. Thereupon they resort to the Fourteenth Amendment of the Federal Constitution, which protects individual rights from undue restraint on the part of the states and assert with vigor that what may be termed the peculiar features of the Ohio law constitute restraints that are violative of the said amendment.

We may remark at this point that one could scarcely expect one police regulation to differ from another, save in respect of some different or additional restraint. For, as pointed out by Professor Freund in his work on Police Power:

"From the mass of decisions, in which the nature of the power has been discussed * * * it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the public wel-

fare, and it does so by restraint and compulsion. * * *

The organized activity of the community is based upon the fact of belief that * * * in certain respects, individual activity is anti-social * * *. The state * * * meets the latter by restraint and compulsion, exercised over individuals. * * * No community confines its care of the public welfare to the enforcement of the principles of the common law. The state * * * exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations, which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power."

Freund on Police Power, Secs. 3 and 8.

Although these matters are, of course, elementary, we cannot refrain from adding to Professor Freund's concise and accurate commentary on the **methods** of the police power the statement of Mr. Justice Holmes, speaking for the court, in *Noble State Bank v. Haskell*, 219 U. S., 104, as to the **extent** of that power:

"It may be said, in a general way, that the police power extends to all the great public needs. *Canfield v. U. S.*, 167, U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary for the public welfare."

That the Ohio law, then, imposes certain conventional restraints and exerts certain conventional compulsions upon the conduct of individuals, is but natural. No violation of the Fourteenth Amendment of the Federal Constitution follows from the mere fact that restraints are imposed and compulsions exerted. The cases cited

by appellant's counsel on this point establish the principle that in order to show that a state police regulation violates the Fourteenth Amendment of the Federal Constitution its assailant must show, not only that it restrains or compels the conduct of individuals but also that:

1. The purpose of the legislation is one for which the legislative power may not be exerted; or that,

2. The means employed for the accomplishment of the purpose have no real, substantial relation to that purpose, or are arbitrary or unreasonable or beyond the needs of the case.

In other words, the logical burden does not shift to those who would sustain a police regulation when it is shown merely that it embodies restraints and compulsions; the adversary must, in addition, show the lack of power to legislate with reference to the purpose intended to be accomplished, the lack of appropriateness of the means employed to the chosen end, etc.

We have made these elementary observations preliminary to discussing the claims of appellant's counsel with respect to those features of the Ohio law which differ from the Arkansas law; but we think that there are certain considerations which lie in the way of the effort of this appellant to question the Ohio legislation under the Fourteenth Amendment. These considerations, it has seemed to us, should be called to the court's attention at this point. We therefore discuss them subordinately to the main heading last above set forth.

1. Appellant Cannot Object to the Ohio Law on the Ground that it Restrains its Liberty of Contract in Violation of the Fourteenth Amendment.

This court has so many times held that one who claims the protection of the Federal Constitution as against a State law must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution, that we feel that we need not do more than refer to the cases cited by Mr. Justice Pitney in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S., 532, as authority for this proposition.

One of the principal, **if not the only ground** of appellant's complaint against those features of the Ohio law which distinguish it from the Arkansas law, is that they restrain the liberty of contract. As shown by statements at pages 14 and 15 of appellant's brief it objects to that provision of Sections 1 and 2 which authorizes and requires the Industrial Commission of Ohio to ascertain and determine the percentage of impurities unavoidable in the proper mining or loading of coal in the several operating mines within the state, and to those provisions of Sections 3 to 5 inclusive of the act which requires the Industrial Commission, in the event of failure of employer or employe to agree with reference to the allowable percentage of fine coal in the output of a given mine, to fix on request of either party, what that allowable percentage is, until such time as the parties to the employment shall agree with respect thereto.

As stated, the complaint is that by the operation of these provisions the employer is precluded from agree-

ing with his employes with respect to the standard of purity-or fineness of the product for which they shall be paid; or as counsel insists upon putting it, which the operatives shall produce in the mine.

Now the appellant describes itself in its bill of complaint at page 2 of the record as "a corporation organized and existing under the laws of the State of West Virginia".

As we understand the decisions of this court, a corporation has no such attribute or natural right as **liberty**. We cannot add to what was said by Mr. Justice Harlan for this court in *Western Turf Association v. Greensburg*, 204 U. S., 361-363:

"The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law, is the liberty of natural, not artificial, persons."

Therefore, because appellant is an artificial person, and therefore does not possess the attribute of liberty which is guaranteed by the Fourteenth Amendment; and because in order to strike down the state law on the ground of violation of the Fourteenth Amendment, appellant must show itself to be within the class protected by that amendment, which it has failed in this particular to do, we submit, without further discussion or citation of authorities, that the appellant, Rail and River Coal Company, cannot raise the question of deprivation of liberty to make contract, and that, therefore, its bill of complaint, which is the only pleading in the case, does not state facts which suffice to permit the court to consider whether or not the admitted deprivation of liberty of contract which Sections 2 and 3 of the Ohio act and

their corollaries produce is such, with respect to its relation to the object to be attained, as to be violative of the Fourteenth Amendment, and therefore to destroy the validity of the law.

2. The Peculiar Provisions of the Ohio Law do not Affect Property Rights as Such.

We have seen that the Rail and River Coal Company, a corporation, cannot complain of any alleged deprivation of liberty, because it is not a natural person. We now submit that the allegation in the bill, supported by one or two assertions in the brief, that these provisions of the Ohio law constitute a taking of the property of the plaintiff without due process of law is erroneous. Whatever effect these provisions have upon private rights is limited to a deprivation of liberty, i. e., freedom of contract; no property whatever is taken.

In *McLean v. Arkansas*, *supra*, the claim was made in the brief of counsel for plaintiff in error that the Arkansas law had the effect of taking property without due process of law as well as of depriving persons of their liberty without process. Mr. Justice Day in discussing these questions simply ignored the claim with respect to the taking of property, and throughout his opinion dealt with the question of deprivation of liberty as the only question in the case. Indeed, we fail to see how the property rights of the appellant are in any way affected by the peculiar provisions of the Ohio law except upon the theory that the ownership of a coal mine and the established business of conducting such a mine involve, as proprietary in their nature, the right to make contracts of employment with respect to the production of

the coal and the operation of the business. It is doubtless true that one of the property rights arising out of the ownership of property is the right to dispose of the property or to deal with it as the owner may deem best, subject at all times, of course, to the social interests; but we point out that this act, or to be more specific, the provisions of Sections 2 and 3 thereof, do not in any way affect the right to dispose of the property of the appellant and those whom it represents, or to deal with it as property in any manner in which they may see fit to deal with it. This is surely true with respect to the standard of purity. This standard is fixed solely for the purpose of figuring in the basis of compensation of the employees which is to be fixed by subsequent contract. The operator is not precluded from selling coal of any designated purity nor is he compelled to produce coal of any standard of purity. Some of the reasons for this statement will be hereinafter developed. At present it is sufficient to state again that the sole purpose and effect of Section 2 of the law is to create a standard on the basis of which employees shall be compensated under future contracts, and the property rights of the appellant in its coal and in its business are in no wise affected.

With respect to the provisions of Section 3, the question is perhaps somewhat doubtful. That section requires, in the first instance, the employers and employees to agree upon an allowable percentage of fine coal, and directs the Industrial Commission, on request of either party, and in the event of their failure to agree, to fix such percentage **ad interim**. The section also authorizes the Industrial Commission to make and enforce orders relative to the production of coal at a given mine which

will result in carrying into effect the Commission's determination as to the allowable percentage of fine coal. This section, and particularly the provision thereof last mentioned, might be considered as affecting property rights. The line between personal liberty and rights of property is, we suppose very indistinctly drawn. We are not aware of any decision in which an attempt has been made to distinguish between these two fundamental kinds of rights. The present case may afford opportunity for such distinction; for it is clear, on reasons already stated, that appellant cannot invoke the protection of the Federal Constitution against any invasion of its "liberty"; whereas, we acknowledge that if its property is taken it may claim the protection of that amendment against any unnecessary or arbitrary taking.

We do not deem this point of sufficient importance in the case to justify elaborate discussion, although the field is inviting. It is sufficient for our purpose to call the court's attention to the fact that primarily, at any rate, the effect which the Ohio law exerts is spent upon the liberty of individuals and that property rights, if affected at all, are affected only in an academic sense.

3. Coal Operators, as a Class, Cannot Complain of the Peculiar Features of the Ohio Law Under the Fourteenth Amendment of the Federal Constitution, Because these Features of the Law do not Injure Them.

The third consideration which lies in the way of an attack by appellant and those whom it represents upon the peculiar features of the Ohio law under the Fourteenth Amendment of the Federal Constitution, is

found upon a principle already alluded to, viz., that one who claims the protection of the Federal Constitution as against a state law must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.

Plymouth Coal Company v. Pennsylvania, **Supra.**

In this case the Rail and River Coal Company sues not only as a corporation but also in the capacity of a producer and employer. Its specific complaint under the Federal Constitution is that Sections 2 and 3 of the Ohio law unduly deprive the employers of their liberty to contract with their employes and to manage and control their own property, in that the power vested by these sections in the Industrial Commission to fix standards of ~~fitness~~ ^{business} and purity precludes the fixing of standards of rejection or standards of quality by private contracts. This, of course, is not strictly true with respect to the percentage of fine coal, which the law expressly makes subject to agreement (Sec. 3). Our position in this connection is, however, that the conventional deprivation of liberty of contract and freedom to manage a private business which these provisions of the Ohio law work is illusory as to the employers. That is, the action which the Industrial Commission is required to take under either of these sections, while in a conventional sense it may be said to remove a given element from the field of private contract to which the employer would be a party cannot possibly work any **injury** to him.

The difficulties of a logical presentation of the case are such that in discussing this question much must be

anticipated and left to more elaborate discussion in a later portion of this brief. For the present, however, our purpose is served by calling the court's attention to the exact language of Section 2 of the act as set forth at page 12 of the record. The section in full is as follows:

"Section 2. Said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurities **unavoidable in the proper mining** or loading of the contents of mine cars of coal in the several operating mines within this state."

We submit that in the first instance this language imposes a **duty** upon the Industrial Commission rather than a power. The Industrial Commission is not to fix any standard of purity which in its discretion it may deem advisable to fix; it must ascertain and determine something which the law presumes to exist as a fact, viz., the percentage of impurities unavoidable in the proper mining or loading of coal in a given mine.

That the Commission's function consists of the ascertaining of facts rather than the imposition of standards is apparent not only from the language of Section 2 itself, but also from the consideration of other provisions of law which are in **pari materia**. We refer the court to the act of the General Assembly passed March 18, 1913, 103 O. L., 95. This is the law creating the Industrial Commission, by virtue of which it exists and exercises its powers and duties. We refer in particular to the following quoted sections thereof:

"Section 25. All orders of the Industrial Commission of Ohio in conformity with law shall be in force and shall be *prima facie* reasonable and lawful; and all such orders shall be valid and in force and *prima facie* reasonable and lawful until they are

found otherwise in an action brought for that purpose pursuant to the provisions of Section 41 of this act, or until altered or revoked by the Commission."

"Section 27. (1) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the Commission in the manner provided in this act.

(2) Such petition for hearing shall be by verified petition filed with the Commission, setting out specifically and in full detail the order upon which a hearing is desired and every reason which such order is unreasonable or unlawful, and every issue to be considered by the Commission on the hearing. The petitioner shall be deemed to have finally waived all objection to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition. All hearings of the Commission shall be open to the public.

(3) Upon receipt of such petition, if the issues raised in such petition have theretofore been adequately considered, the Commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issues raised, the Commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the petitioner and to of such hearing shall be given to the petitioner and to such other persons as the Commission may find directly interested in such decision.

(4) Upon such investigation, if it shall be found that the order complained of is unlawful or unreasonable the Commission shall substitute therefor such other order as shall be lawful and reasonable.

(5) Whenever at the time of final determination upon such hearing it shall be found that further time is reasonably necessary for compliance with the order of the Commission, the Commission shall

grant such time as may be reasonably necessary for such compliance."

"Section 38. Any employer or other person in interest being dissatisfied with any order of the Commission may commence an action in the Supreme Court of Ohio, against the Commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The Commission shall be served with summons as in other civil cases. The answer of the Commission shall be filed within ten days after service of summons upon it and with its answer it shall file a certified transcript of its record in said matter. Upon the filing of said answer said action shall be at issue and shall be advanced and assigned for trial by the court, upon the application of either party, at the earliest possible date."

"Section 41. The pendency of an action to set aside, vacate or amend an order of the Commission shall not of itself stay or suspend the operation of an order of the Commission; but, during the pendency of said action the said Supreme Court in its discretion may stay or suspend, in whole or in part, the operation of the Commission's order. But no order so staying or suspending an order of the Commission shall be made by the said court otherwise than upon three days' notice and after hearing. In case the order is stayed or suspended the order of the court shall not become effective until a suspending bond first shall have been executed, filed with and approved by the Commission, or by the said court or the clerk thereof, payable to the State of Ohio, and sufficient in amount and security to insure prompt payment by the party petitioning to set aside, vacate or amend such order of all damages caused by the delay in the enforcement of the order of the Commission."

"Section 42. All actions and proceedings under this act, and all actions or proceedings to which the Industrial Commission of Ohio or the State of Ohio

may be parties, and in which any question arises under this act, or under or concerning any order of the Industrial Commission, shall be preferred over all other civil cases, except election causes and causes involving or affecting the public utilities commission of Ohio, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the Industrial Commission in any action or proceeding in which he may be allowed to intervene."

Other sections of the same act are of interest in this connection, but we do not wish to burden this brief with extensive quotations. In passing, we may say that the special jurisdiction of the Supreme Court provided for in the above sections is specifically authorized by Section 2 of Article IV of the Ohio Constitution, but as there is no issue in the case with respect to this point we do not quote the constitutional provision.

Manifestly, if the Industrial Commission's function were to create standards, the judicial review provided for would be inappropriate. Rather, it must be said that it is the Commission's duty to ascertain facts and to apply the law to them; in discharge of which duty it is subject to the reviewing power of the Supreme Court, and all proceedings which the Commission may take with respect to any matter within the field of its activities are, we submit, characterized by due process of law.

The case is not greatly different with respect to the matter of fine coal to which Section 3 of the act relates. The following distinctions, however, may be observed:

In the first place, the Commission is not to act at all except in the event of a failure on the part of the employer and his employees to fix, for stipulated periods,

the allowable percentage of fine coal. But in the event that the Commission does act by reason of the failure of the employer and employees to agree (and only upon the request of one party or the other) the Commission is to make an **ad interim** order fixing such percentage.

The Commission is then vested with authority to make orders with reference to the production of coal with a view to enforcing its standard, and these orders would necessarily operate upon the employees and not upon the employers. A violation of the orders themselves would be punishable under Section 43 of the act of March 18, 1913, which provides as follows:

"If any employer, employe or other person shall violate any provision of this act or shall do any act prohibited by this act or shall fail or refuse to perform any duty lawfully enjoined within the time prescribed by the Commission, for which no penalty has been specifically provided, or fail, neglect or refuse to obey any lawful order given or made by the Commission, or any judgment or decree made by any court in connection with the provisions of this act, for each such violation, failure or refusal such employer or other person shall be fined not less than fifty dollars nor more than one thousand dollars for the first offense and not less than one hundred nor more than five thousand dollars for each subsequent offense."

The determination of the Commission when called upon to act under Section 3 of the law must necessarily partake of the same character as the determination which it is required to make by Section 2 of the same act; for with respect to both orders the same reviewing power exists; and in the reviewing court the question as to allowable percentage of fine coal must necessarily be considered as a fact. In the last analysis then the standards are those of the law itself.

How, then, can the employer complain of a law, which requires of his employees the maximum of efficiency? What more efficacious control for his own benefit over the acts of his own employe could he exercise if the law contained no such provision? In what respect is he injured?

The lower court on this point made the following salient comments found at page 21 of the record.

"It must be presumed that the Industrial Commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities, except such as is unavoidable. The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the Commission's order, which by statute is made *prima facie* reasonable and lawful, he may petition for and obtain a hearing before the Commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the state."

It is ridiculous, then, to characterize these provisions as in any way arbitrary or unreasonable from the standpoint of the employers. The only parties who might complain of them with good grace are the employees, though in point of fact there is no real injury to the employe.

In passing, we feel that we ought to controvert a statement made at the bottom of page 34 of appellant's brief. In dealing with the subject of court review counsel say:

"The establishment by the Commission of a percentage of impurities so high as to make the coal unmarketable, might shut down the mines during the court review, with losses that would be irreparable."

We call the court's attention to Section 41 of the act of 1913, above quoted, which provides for the issuance of orders of stay and suspension. In considering the question of constitutionality it must, of course, be presumed that the court in a proper case would exercise the powers vested in it by this section.

There is another reason apparent on the face of the act upon which we found our claim that the operators are not injured by those provisions which differentiate it from the Arkansas law. We call attention now to the sanction by which these peculiar features of the Ohio law will be enforced, which is embodied in Section 7 thereof. This is one of the two penal sections of the act. Section 6, which is the other penal provision, prescribes the consequence of passing the contents of a mine car of coal over a screen or other device for the purpose of ascertaining or calculating the amount to be paid to the miner or loader, whereby the total weight of the contents shall be reduced or diminished. The offense thus defined is one which could be committed only by an **employer**. The substantive requirement of the law which is thus enforced, however, is one which this court in *McLean v. Arkansas*, *supra*, has held to be within the police power of the state; so that in this connection, in which we are discussing only those features of the Ohio law which differ from the Arkansas law, we are not concerned with Section 6.

Coming now to Section 7, we think it may be useful for the purpose of our discussion, to quote it here in full:

"A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said Industrial Commission, as

hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows; for the first offense within a period of three days he shall be fined fifty cents; for the second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

It will be at once observed that this section constitutes the only sanction under the law itself for the enforcement of the substantive provisions of the latter part of Section 1 and those of Section 2 of the act. That is to say the act, having provided in Section 1 thereof, that a miner or loader shall be paid for the total contents of the mine car only upon condition that such contents when removed contain no greater percentage of impurities than that ascertained and determined by the Industrial Commission; and in Section 2 that the Industrial Commission shall ascertain the percentage of such impurities unavoidable in the proper mining or loading of coal in a given mine, Section 7 provides what shall occur in the event that the miner or loader brings to the surface a mine car containing a greater percentage of impurities than that so fixed.

Examining said Section 7 it appears, first, that the penalty which it prescribes is visited upon the employee and not upon the employer. How, then can the employer complain of this feature of the law when its burdens are not cast upon him but upon his employees? As we see it, such complaint could be made only upon one theory,

viz., that by making it an offense for the employe to bring to the surface a mine car containing a greater percentage of impurities than that ascertained by the Industrial Commission as the unavoidable minimum, the law makes all contracts of employment which provide for compensation upon any basis other than the total weight of a mine car containing less than the prescribed percentage of impurities illegal and void. Therefore if a car were brought to the surface containing a greater amount of impurities than that fixed by the Commission the employer would have no choice in the matter but must necessarily reject the whole car and lose as much valuable product as might be contained therein; whereas if the percentage of impurities is within that fixed by the Commission and such standard is not satisfactory to the employer (in spite of his presumably having ~~exhausted~~ ^{exhausted} his other remedies by applying to the court for a review of the Commission's determination) he must accept and pay for the whole car load without any means of encouraging, by means of the basis of compensation, the production of the extraordinarily pure grade of coal which his market requirements may dictate.

It is upon the assumption that the foregoing is the effect of the law, that counsel for appellant have discussed this entire feature of the case. They simply assume that the act of the Industrial Commission under Section 2 has the effect of depriving the employer of all control over the quality of the product which is to be taken from his mine. We submit that although that which we have described might be the effect of Sections 1, 2, and 7 of the law in the absence of the proviso at the end of Section 7, the presence of that proviso produces an entirely different effect.

Let the proviso be analyzed. It is to the effect that nothing contained in Section 7, which is the penalty clause constituting one of the sanctions for the application and enforcement of a standard of purity fixed by the Industrial Commission under Section 2, shall affect the right of the employer and employe to agree upon deductions by the system known as "docking" on account of impurities. Although the qualifying effect of the proviso is in words limited to "this section" we submit that in reality such effect is exerted with respect to Sections 1 and 2 as well; for, without Section 7, there is nothing in Sections 1 and 2 which would enjoin upon the employer the duty of rejecting the entire car load if he were not disposed so to do, though he might doubtless do so if he wished make such rejection.

Now, the penalty provisions of Section 7 might have the effect, as already stated, of compelling the operator to reject a car load containing a greater proportion of impurities than that fixed by the Commission on the theory that to agree to do so would constitute an illegal contract, but this interpretation of the law is rendered impossible by the proviso with respect to docking. This proviso clearly enables the operator to agree with his employes to accept car loads of coal containing a greater percentage of impurities than that fixed by the Commission, in which event he need not pay for the entire contents of the car, but may dock his employes under such an agreement on account of the presence of impurities in the coal. So far at least it cannot be said that the effect of those provisions of the law authorizing and requiring the Industrial Commission to fix standards of purity is to impose upon the operator a basis

of acceptance or rejection by which he is absolutely bound. He is bound to accept if the standard of purity is complied with, but he is not bound to reject if it is not complied with, though he may do so if he desires.

With respect to the fine coal, it will be observed that the mere **ad interim** order of the Industrial Commission issued under Section 3 of the act is not directly enforceable at all. It is not until after the Industrial Commission has found that the total out-put of a mine for a period of one month during which it has been operating under such a preliminary order shows an excess of fine coal that it is to make and enforce orders relative to the production of coal at that mine. These orders, as has been remarked, would necessarily be directed to the employees. It is true that neither the preliminary order of the Commission nor any of its subsequent orders could authorize the employer to reject a mine car load of coal on the ground that it contained **too much** fine coal, it being the clear intent of Section 1 of the act that all coal shall be paid for as such. We believe that it is not claimed, and we insist that it cannot be claimed, that an operator would have the right to insist that **nothing but lump coal** be mined. Such a condition in an employment contract would be impossible. The most that an operator can do to protect himself from over production of fine coal is to use some means, persuasive in their nature to induce care in mining. He is not precluded by any provision of the act from adopting any such means excepting the rejection of an entire car on the ground that it contains too much fine coal, and this he would never be disposed to do under any circumstances because, as pointed out in numerous places in the report

of the Ohio Coal Mining Commission, the fine coal is itself a marketable product. Therefore the alleged right of rejection on account of an undue proportion of fine coal in the mine car is not a valuable right, and nothing of real interest to the operator is taken from him by the act so long as he is permitted to make contracts which will tend to discourage the production of fine coal. This he may do by stipulating that fine coal shall be paid for at one rate and lump coal at another, a stipulation which the act does not prohibit. Nor does ~~the~~ act make such a stipulation impossible of performance, because while screening the coal for the purpose of compensation in a way so that the **total weight of the contents is reduced or diminished**, is prohibited by Section 6 of the act, there is no prohibition against screening the coal for the purpose of fixing compensation, provided the total weight for which compensation is paid, is not reduced or diminished.

Now, the orders of the Industrial Commission under Section 3 of the law are manifestly for the protection of the employer. It is asserted by appellant that the employers repudiate any such protection and insist that they are not in need of it. The report of the Ohio Coal Mining Commission, however, as we shall hereinafter point out, proves the contrary. At all events, however, Section 3 does not, for the reasons just stated, deprive the operators of any real or substantial rights, and, therefore, cannot be complained of by them as such.

There is still another view which we think might be well presented here, even at the risk of consuming too much space on a purely preliminary point. The argument of appellant's counsel with respect to the effect of

the provisions which we have been discussing, is based entirely upon the assumption that in the absence of legislation, an employer would have a right to reject coal not conforming to the standard of purity dictated by his market requirements as he might interpret that standard. Let us see, then, how the view of appellant's counsel are developed:

It is pointed out on page 15 of appellant's brief, and again at page 28, that the production of some impurities is unavoidable in all mining. Many impurities, such as sulphur, are imbedded in the coal in such a way they cannot be separated from it; other impurities, such as slate, might be separated from the coal, but even in the exercise of extraordinary care, it would be impossible to load the coal entirely free from it. If left to himself, the operator might agree with his employees respecting the production of impurities in two ways; first, each employment contract might stipulate a definite percentage just as the act requires the Commission to determine. Second, the agreement might be that coal containing an unreasonable or undue amount of impurities might be rejected at the option of the employer. We suspect from what counsel say at page 27 of their brief that the typical agreement in the past has been of the second kind. Indeed, appellant's counsel object to the law for the reason, among other things, that it substitutes a definite standard of rejection for a "rule of thumb" method of passing the product. Now, if the employer should agree with his employees upon a definite standard of rejection, that standard could, as the court below well said, not go further than the standard which the law itself adopts, and which it requires the

commission to enforce, viz., the unavoidable percentage of impurities in the proper mining of coal in a given mine. Should the operator not wish to go to this extent in protecting his interests, he is not injured by the commission's determination, and its consequences, for as we have seen in that event he has still the right to agree upon a system of docking. The operator in contemplation of the law cannot possibly protect himself by a definite percentage any more fully than the law itself protects him; hence, the alleged deprivation of rights in so far as it affects his rights to agree with his employers upon a definite standard is illusory.

But if the employer prefers the "rule of thumb" the question at once arises as to whether he has a natural right to enforce such a rule. Our contention here is that he has no such right, so that the law by putting an end to such a practice does not deprive him of anything. Suppose the agreement were that the employer might reject coal that was impure without stipulating the standard of purity by way of definite percentage. Can it be for a moment contended that the operator under such an agreement can arbitrarily reject mine car loads of coal and thus deprive his employees of compensation **pro tanto** for work which they have performed?

We think it is elementary that if the operator rejects by a "rule of thumb" he does so subject to the right of the employee to sue to recover his wages for mining or loading such rejected coal, in which suit the issue would be as to whether or not the car load brought to the surface by the miner contained an undue amount of impurities. In other words, the employer's rejection would not be final. He would have the right to reject only to the

extent that the basis of his rejection was correct in fact. He cannot exercise any arbitrary privilege in the premises at all. So that if the operators base their plea for protection under the Fourteenth Amendment of the Federal Constitution upon the deprivation of a supposed right to reject **arbitrarily**, it at once appears that the thing of which they have been deprived is not a right which exists and is protected by the amendment.

But assuming the existence of a "rule of thumb" and assuming, too, that the application of that rule might be challenged in an individual case in a suit to recover wages based upon alleged improper rejection, what would be the standard which the court would instruct the jury in such a case to apply? Obviously the instruction of the court in the absence of any statute would be that the operator would have the right to reject a car load of coal containing a percentage of impurity in excess of that which would be produced by the exercise of proper care and in the proper mining of the product; but that if the percentage of impurities which was found in the car load was no greater than would be unavoidable in the proper mining of coal in the mine in question, the operator could not reject the car load and deprive his employees of compensation thereby.

In short, in an action for wages between an employee and his employer in which the right of reduction on the part of the employer under an employment contract of the second class above referred to would be brought into question, **the law applied by the court and jury would be exactly the same law as that embodied in Sections 1 and 2 of the Ohio act now under review.**

Therefore, it follows with certainty that these provisions of the Ohio law do not deprive the operators of any rights which they have or enjoy under the federal constitution. If any rights are taken away it is those of the operatives, designated in the act as miners or loaders, for the act is at least susceptible to the interpretation that the standard of efficiency exacted of them by the sections now under consideration is such as to require extraordinary care.

For all the foregoing reasons, then, we submit that the operators as a class are not deprived of any real or substantial rights by those provisions of the act of Ohio which differ from and are additional to the provisions of the Arkansas law so that the question as to whether the alleged deprivation of rights is justified under the police power is not even properly raised in this case.

4. The Provisions Particularly Complained of are Appropriate and Necessary Incidents to the Main Object of the Law.

We have just finished the discussion of three reasons which we think lie in the way of any effort on the part of the Rail and River Coal Company to invoke the protection of the Fourteenth Amendment of the federal constitution; those reasons being, first, that it is a corporation, and as such not entitled to claim that its liberties are invaded; second, that the act does not in any way deprive it of property; and third, that those provisions of the Ohio law in respect of which it differs from the Arkansas law, do not in any real or substantial way deleteriously affect the interests of the coal operators as a class,

whether those interests be regarded as pertaining to the right of liberty or the right of property.

These points have been mentioned because they are in the case; but it is by no means necessary to rely upon them in order to dispose of the general issue. These provisions of the Ohio law are so plainly and palpably incidental and appropriate to the accomplishment of the main purpose of the law, which is the same as that of the Arkansas legislation, that the case may be rested upon this consideration alone.

We recall to the court's attention that in the McLean case it was held that a state in the exercise of its police power might require that coal miners working under a wage scale based upon weight should be paid for all coal mined by them, and that their employers might be prohibited from using a screen or other device for the purpose of subtracting from the gross weight of the product mined by their employes for the purpose of ascertaining the compensation of the latter. We mention again also that the fact that the Ohio law aims to accomplish these same results; so that, if it went no further, its constitutionality under the Fourteenth Amendment to the Federal Constitution could scarcely be questioned seriously. So that we are dealing, so far as the Fourteenth Amendment and claims of right put forward under it are concerned, solely with those provisions of the Ohio law in respect of which it differs from the Arkansas.

We repeat here, too, that appellant, in assailing the Ohio law on account of the presence of these additional provisions, has assumed the burden of showing that they have no necessary or appropriate relation to any public purpose, or that considered as a means to some proper

end, they are arbitrary, unreasonable or beyond the needs of the case.

In order to sustain the burden thus cast upon their clients, counsel for appellants in their brief, beginning at page 15, first discuss the effect of Sections 2 and 3 and related provisions of the Ohio law upon the alleged rights of the operators. Previously in this brief we have shown, we think, that no real or substantial rights of the operator are in any wise deleteriously affected by these provisions. But this, of course, is not the question now under discussion. It would be only natural, as we have pointed out, to find that a police regulation, justifiable only as such, does in a conventional sense restrain and compel the conduct of individuals in ways to which such conduct would not be limited by the common law; therefore the mere fact that restraints and compulsions are found in a law of this type, does not put an end to the inquiry, but merely raises the question as to the relation of such restraints and compulsions to the public end to be served.

The cases cited and quoted from by counsel at pages 19 to 22, inclusive of their brief, merely state the rule which must be applied here as we ourselves have stated it. Searching through the brief of counsel for a reason supporting their claim that the provisions of the Ohio law, different from those of the Arkansas law, "are arbitrary, unreasonable and unnecessary" we find the first suggestion of such a reason at the bottom of page 25 of the brief. Beginning at that point and extending to the middle of page 28 will be found an argument, the effort of which is to show *a priori* that these features of the Ohio law, the nature of which has been sufficiently dis-

closed heretofore in this brief, are impracticable; that the Industrial Commission cannot in the nature of things fix a standard of purity or of fineness that will be of any service, and that even if such a standard could be fixed, it would be impossible to apply it in the way in which the law intends it should be applied.

We feel that we need not answer any such argument as this, in view of the well established principle that laws will not be declared unconstitutional upon mere speculation. It is true that the bill avers, as counsel state, that "the proposed plan of control and supervision by the Industrial Commission is arbitrary, unreasonable and wholly impracticable in the daily business operations of mines," and that "it must be assumed here that upon the hearing on the merits, evidence" (consisting, no doubt, of opinions) "will be offered to sustain these averments." But we point out that the bill shows on its face that it was filed not only before any opportunity for gaining experience under the actual operation of the law had been afforded, but even before the law went into effect. (See paragraph 8 of the bill, page 4 of the record.) We understand that this court has in numerous cases declined to consider averments of this sort as bearing upon the constitutionality of a law. Actual experience is required in order to stamp a law as ineffective, impracticable or unreasonable.

Red "C" Oil Co. v. Board Agriculture, 222 U. S., 380.

Patapseo Guano Co. v. N. C. Board of Agriculture, 171 U. S., 345.

Knoxville v. Knoxville Water Co., 212 U. S., 1.

Willeox v. Consolidated Gas Co., ~~212~~ 212 U. S., 19.

None of the cases cited involve a question precisely like the one here made, but we submit that the principle which runs through them is properly applicable here. Apprehensions will not suffice to strike down the legislation of sovereign states; actualities are required. But the files of this court will show the inappropriateness of the claim made by counsel for appellants. The report of the Ohio Coal Mining Commission shows that the investigations and conclusions therein abstracted were the work of a body of men selected for the task because of their peculiar qualifications. The resolution creating the commission provides expressly that one of the members of the commission shall be "a representative of the producers of coal," and that one shall be "a representative miner," the remaining members of the commission were to have "no direct or indirect pecuniary interest in the mining, production or transportation of coal in this or any other state or country." (103 O. L., 981.)

As a matter of fact the commission consisted, in addition to the members required by the resolution, of a judge of one of the appellate courts of the state, a professor of economics in the State University and an inspector of mines. Three of the members of the commission were formerly practical miners. Indeed, one of them was a miner in active service at the time of his appointment. The gentleman who represented the operators possessed an experience perhaps excelled by no other available person. (See affidavit of John M. Roan in opposition to the application for a temporary restraining order, on file with the clerk.)

We feel that we may step outside of the record for the purpose of acquainting the court with these facts, which

are of common knowledge in Ohio, as is the further fact that it was well known that the measure which the court has under consideration in this case was to be the primary subject of the investigation of the commission. In fact, even a cursory examination of the joint resolution above cited will show this to be the case.

Now, appellant's counsel criticize the commission's report because it does not demonstrate just how the plan of having the Industrial Commission determine the percentages to which the act refers will operate in practice. (See page 27 of the brief.) We say the fact that the Ohio Coal Mining Commission was as representative as it was, taken in connection with the fact that after a most careful and thorough investigation of the entire subject, its members unanimously recommended the measure which the court is asked to strike down, sufficiently establish the inference, which is the only inference which at this time may be entertained by the court, that the requirements of the act are practicable and will operate reasonably.

But it is not necessary for us to establish that the act will operate in practice; the burden is, as we have stated, upon appellant to establish that it will not operate in practice. This appellant's counsel has sought to accomplish by naked assertion.

The next positive objection to these peculiar features of the Ohio law which we find mentioned in appellant's brief is suggested at page 29 thereof. It finds expression in the argument that because the commission is to make a separate determination as to each mine and because market conditions do not vary in relation to physical conditions in the several mines of the state, therefore

market conditions are not intended to be taken into consideration in applying the statutory rule as to proper mining and unavoidable impurities. Then the claim is made that a standard of purity which does not take market requirements into consideration is arbitrary and unreasonable.

It will be observed, first, that this argument depends upon the premise that the act excludes from consideration the market conditions. It is a well known fact, of which the court may take judicial notice (and if judicial notice needs assistance, reference to part one of the report of the Ohio Coal Mining Commission, and particularly 1 to 13 thereof, will suffice for this purpose) that coal is deposited in the earth in seams corresponding to geological strata. The commission finds that several distinct seams occur in Ohio, and that the coal from such seams as are workable finds its way in the ordinary channels of trade to well defined markets. For example, seam No. 2 is spoken of at page 9 of the Commission's report in the following language:

"The coal is chiefly consumed within the state or is purchased by the railroads for use in locomotives. Owing to its softness it is not suitable for the lake trade."

We call the court's attention, without quoting, to the remarks of the commission with respect to seam No. 8, known as the "Pittsburg Seam" (pages 11 and 12 of the Report), which we believe is the seam in which the mining operations of the appellant are carried on (although this does not affirmatively appear in the record).

It is true, then, that the market for coal from a given seam is a rather well defined thing and the methods of

mining have a clear and recognizable relation to the condition of the seam and to the market. Therefore, upon these facts we submit that it is at least partly true that the proper mining of coal in a given mine has a direct relation to the conditions of the market into which coal from that mine will go.

Moreover, we think that in the ascertainment of a standard of "proper mining" market conditions would be a natural factor, and that the act implies as much on its face.

Of course, if the law **permits** market conditions to enter into the determination of what constitutes proper mining and an unavoidable percentage of impurities, etc., as well as an allowable percentage of fine coal, it follows that the law also **requires** this feature to be taken into consideration. And if the law **requires** such a determination then the presumption is that the same **will be made**. Nor is the law without ample safeguards against improper action on the part of the Industrial Commission, as we have already pointed out.

Another specific objection to the peculiar features of the Ohio law is stated, but not developed, at the bottom of page 30 of the brief. It is that the introduction of a percentage system will "cause nothing but discord and trouble."

We suppose that it is hardly incumbent upon us to discuss this claim seriously because there is no argument in appellant's brief in support of it. We may suggest to the court, however, that there would seem to be less likelihood of discord and trouble arising under a definite standard than would arise under the "rule of thumb" of which counsel speak on another page of their

brief. Indeed, if **a priori** reasoning is permissible at all (and we are in the position of objecting to it for the purposes of this case) we should like to suggest some reasons of this character, tending to show that the fixing of a standard is rather a means of **avoiding** discord and trouble than a likely cause of disturbances.

Another, and perhaps the last ground of objection to those features of the Ohio law, in respect of which it differs from the Arkansas law, is suggested at the bottom of page 31 of the brief. It is stated that the regulatory features which peculiarly characterize the act under consideration are alleged to be necessary to protect the operator against certain evils upon the supposed theory that he will be unable to protect himself from their occurrence under a mine-run system of compensation. The following argumentative question is then asked:

"Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts?"

It is pointed out that legislation affecting the compensation of employes and otherwise regulating the terms of employment contracts, is justified on the ground that it protects the employe as the "dependent party." Therefore it is inferred, though not stated, that the employer must be under all circumstances in a position of natural advantage so that legislation for his benefit cannot be sustained under the police power.

This line of thought sounds well as an abstraction, but when the facts surrounding the enactment of this law and the experience of other states under mine-run laws are examined and the true situation appears, the neces-

sity for such regulation becomes at once apparent. Inasmuch, however, as discussion of this point is positive rather than negative, we postpone it to a more appropriate place in this brief.

Lastly, and perhaps in the same connection, it is complained in very strong language on page 32 of the brief that the provisions under discussion subject the operator to drastic burdens. We are unable to see that any real burdens are imposed upon the operator by **these features of the act** at all, and this point has been developed previously in this brief. The language of appellant's counsel throughout the brief in criticizing these provisions of the Ohio law, may be, we think, fairly described as intemperate. A reiteration of adjectives such as "arbitrary," "unreasonable," "impracticable," "useless," "unnecessary," and the like is manifestly out of place, if we may say so with deference, for the reason that the exact issue of law is as to whether, in the legal sense, these requirements of the Ohio law are, reasonable, necessary, appropriate, etc.; so that to argue to the desired conclusion by merely characterizing the provisions in question in the manner in which they are referred to in the brief, begs the main question.

We come now to the positive argument in support of the proposition for which we are contending, having dealt with the objections made by appellant as they appear in the brief. That contention is that the provisions which the law makes for fixing standards of purity and fineness are appropriately incidental to the accomplishment of the main purpose of the act. That the main purpose of the act is within the police power of the state, so that any means chosen to effect that purpose and ap-

propriate thereto, are devoted to a public end, is a question which, so far as the Fourteenth Amendment to the constitution is concerned, is, it seems to us, not open to doubt.

McLean v. Arkansas, *supra*.

The facts which show the relation of the provisions which are discussed in the briefs to the main purpose of the act are fully set forth in the report of the Ohio Coal Mining Commission, to which reference is generally made. They are facts of which the court may take judicial notice.

Muller v. Oregon, 208 U. S., 412.

The experience of states like Arkansas, operating under what might be characterized as a straight mine-run basis of compensation, shows that when the law or the employment contract requires compensation on the basis of the entire weight of the coal produced, coupled with a right of rejection on the part of the employer, the very marked tendency on the part of the miners is to load into the cars everything which can be taken out of the mine, including not only marketable coal but also impurities, dust and slack. The operator's right to reject or to dock is of no avail to him, because it can be made effective only at the risk of losing what is valuable in the product mined. That is to say, if the operator finds his mine cars filled with dirt and impurities and his coal shot into powder, he must, as the Arkansas law had it, "either accept or reject." If he accepts then he is put to the expense of cleaning his coal before it can be marketed; if he rejects, the whole car load goes to the dump

and is a total loss. Of the two evils the operators chose that which was obviously the lesser and accepted the coal. The consequence of this was a tremendous waste, first in the deterioration of the quality of the coal entering the markets from the mines of the state, and, second, in the otherwise wholly unnecessary expense involved in cleaning the coal.

To show what the actual tendencies with respect to impurities are we may quote from the report of the Ohio Coal Mining Commission, which abstracts the testimony of a former president of the Illinois Coal Operators' Association, the value of whose opinion seems to have been regarded by all parties as very great. The following quotation from his testimony is found at page 56 of the report:

"In the most mines where the men get paid for mine-run coal, they get everything out they can load on a shovel, where they didn't continue to do that when the product went through the screen; that is, if a man was cleaning up his place, he cleaned it up just as clean as this floor because he gets paid for it if it is being weighed and paid for mine-run."

And again at page 58 of the report this witness is quoted as saying:

"A. Yes, whether the coal is cut low or high, why, the men will load everything that is loose in that room, where under the lump-coal system, they formerly left that in because it didn't do them any good.

"Q. How did you dock them? A. You can't dock them, you can't catch them.

"Q. There is no way of catching a man on the run-of-mine system? A. Under that system you can't catch that class."

There is other testimony to the same effect in the report. The conclusions of the commission are stated at page 58 of the report in the following language:

“Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface, unless some way were found to protect the operator from the carelessness or indifference of the miner.”

It will be observed that the commission reached this conclusion after a very careful investigation and upon testimony produced before it by the operators themselves. There can be no doubt whatever as to the correctness thereof.

Now, no operator will be heard to say that he desires an increase of impurities. If, under a straight mine-run system like that which obtains in Arkansas, there has been a marked increase of impurities of the kind referred to in the commission's report, it must have occurred in spite of all the operators could do to prevent it; therefore the conclusion irresistibly follows, that if left to themselves on this point, and given unrestricted “freedom of contract” for their own protection, the operators would not protect their product but their business would appreciably suffer. There is only one alternative to the result which has actually occurred in Arkansas, Illinois, Indiana and other states having the mine-run system. Should the operators assert themselves and endeavor, by docking, rejection or otherwise, to protect their product from deterioration by the loading of impurities, they would have only the “rule of thumb” of which appellant's counsel speak, by which to enforce their supposed rights. If we are to speculate,

may we not fairly assume that any effort on the part of the operators, under a straight mine-run system, to protect themselves against over-production of impurities by rejection or by docking, both according to the "rule of thumb," would result in disputes and heated controversies with their employes? It seems very natural to us that this should be so.

With respect to fine coal, the situation is somewhat different. The testimony of the same witness is quoted at page 48 of the commission's report as showing that the mine-run system does not produce a marked over-production of fine coal, save in mines in which the coal is cut by hand or the use of the pick. In machine-cut mines there is no temptation to "shoot from the solid" and thus to use so great a charge of powder as to shatter the coal. Nevertheless, the operators who appeared before the commission expressed the gravest apprehension lest the elimination of the screen as an instrument or device for use in fixing the basis of compensation, might result in an over-production of fine coal; so that the commission in order to guard against an evil which might possibly exist saw fit to recommend the insertion in the law of those provisions which relate to this subject.

Whatever may be the evils of the straight mine-run system from the standpoint of the operator, he is helpless to prevent them and can do nothing but to install washing machinery at large expense. His helplessness is not due to his being naturally the dependent party to the employment contract; it is a condition forced upon him by a law of the state compelling him to pay his miners on the basis of the entire weight of every accepted mine car.

So, then, it is the **law**, that is, a straight mine-run law like that of Arkansas, which has placed the operators subject to such a law, in a position of disadvantage. If, then, it is within the legislative power to create such a disadvantage, does not the same legislative power extend to the removal of such disadvantage?

In the light of the actual experience under the Arkansas law and wage schemes similar in effect, does not the alleged desire of the appellant to be allowed to exercise its liberty of contract in fixing standards of purity and the like appear in a questionable light? All the elaborate and plausible argument which may be found in appellant's brief relative to what might or would happen under certain circumstances loses its force when what has actually happened under those circumstances is made to appear. We cannot believe that those represented by appellant sincerely object to the peculiar features of the Ohio law; their vehemence on this point suggests to us that the real object of their attack is the mine-run system itself, which the McLean case protects from direct assault.

The direct and positive relation of the provisions with respect to standards of purity and fineness to the main object of the law, is therefore, found in the fact that, without these provisions, the practical operation of similar legislation has resulted in evils which partake of a public nature and are themselves proper subjects of regulatory legislation. That the safeguards against the evils which would otherwise attend upon the operation of the law must of necessity be efficacious is, we think, not open to argument notwithstanding the contradictory statement of appellant's counsel. It is said that it

would be impracticable to determine whether or not the contents of a mine car contain, for example, more than a prescribed percentage of impurities. This statement of counsel is based upon a probable misunderstanding of what the law requires. They have evidently confused its provisions with those of the Arkansas law, which requires the coal to be accepted or rejected before it is weighed and screened. Of course, if the quality of the coal is to be determined by inspection of the mine car, there will never be any way to test the quality by definite standards. But the Ohio law contains no such provision. Its prohibition against the use of the screen is directed against employing it for the purpose of subtracting from the total weight of the contents of the car. There is no prohibition against screening the coal before it is weighed or before it is accepted or rejected or the basis of docking fixed. If there were installed what are called in the affidavit of Mr. John M. Roan on file with the clerk "hopper scales" it would be very easy to determine the exact proportion of impurities and the exact proportion of fine coal in the contents of any mine car. Therefore, the difficulties which have been encountered by the operators under the Arkansas and Illinois laws would be entirely obviated and it would be possible to detect with precision any and all improper or careless mining and to fix the compensation of the guilty miner accordingly.

We see, therefore, that the "rule of thumb" of which counsel speak can be done away with and that its elimination would make effectual all the provisions of the Ohio law which are designed to safeguard against the occurrence of those evils which experience has shown necessarily follow from the operation of a straight mine-run law.

That these are real public evils of such a nature as to justify the exercise of the police power for their obviation is demonstrable by the use of authorities which are cited against us on the general issue of the case. One such decision will suffice. We refer to the case of *In Re Preston*, 63 O. S., 428. In that case an Ohio statute almost exactly like the Arkansas law upheld by this court in the *McLean* case, was declared unconstitutional by the Supreme Court of Ohio. In the course of the opinion, per Shauck, J., appears the following language, which constitutes the sole reason given by him for the decision at which the court arrived:

"By the method of payment heretofore used, in which compensation was determined upon the basis of screened coal, miners had become entitled to receive, and operators had become bound to make compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to the miners without discrimination on account of their skill and care. * * * Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it established a uniform standard of earning capacity. A standard thus to be established for all must necessarily be that of the **least efficient**, since their efficiency cannot be increased by legislation * * *."

Stated succinctly, the provisions of law involved in this decision (and it will be found repeated in the syllabus, which under the rules of the Ohio court embodies the decided law of the case) is that a law, the natural result of which is to discourage efficiency and reward inefficiency cannot be justified under the police power,

though it may tend in other ways to beneficial results. That is to say, the Ohio court held the former screen law unconstitutional because it resulted, or would result, in a public evil; for nothing but a public evil would justify a court in taking the attitude which the Ohio court took. Now, if the evil of which Judge Shauck speaks in his opinion *In Re Preston*, was sufficient upon which to found the operation of a constitutional limitation against a law passed by the legislative department, is not the obviation of that evil as an incident to similar legislation, an end within the legislative power? And if this is so, does it not follow that provisions like those about which specific complaint is made in this case are necessary and appropriate incidents to the accomplishment of the main object of the law?

These argumentative questions suggest to us their own answers, and we submit that the very constitutional demerits seen by some of the courts in laws like that of Arkansas, constitute, in any view of the case, public evils grave enough to justify the imposition of safeguards through effective provisions like those peculiar to the Ohio law.

Again, the operators spurn protection against fraud on the part of their employes, saying that they have never been considered to be the weaker party, and inquiring upon what theory protective legislation can be justified for the benefit of the stronger party. Curiously enough it is alleged in the bill, though not developed in the brief of appellant, that the effect of the Ohio law is to deprive appellant of the equal protection of the laws of the state. We have shown that in practice, laws like the Arkansas law, tend, in a sense at least, to protect the employes to

the detriment of the employers. Though we should not at this stage and in view of the decision in *McLean v. Arkansas*, urge that such law as that of Arkansas results in unequal protection, yet it is clear that the purpose of the Ohio law is to afford as much protection to the employer as the other provisions of the law give to the employees. For, under the Arkansas law as it practically operates, and upon the facts disclosed in the inquiry conducted by the Ohio Coal Mining Commission, it appears that the employers have been unable to protect themselves against the production of an undue proportion of impurities on the part of their employees. The conduct of the employees has proved to be such as might almost justify the appellation of fraud. The Ohio law protects the employers against such frauds and, therefore, the protection accorded to the employers is equal to that accorded by the remainder of the law to the employees. May we not then suggest that the additional provisions of the Ohio law are conceived in the spirit of affording equal protection of the laws to both parties to the employment contract?

In another view of the case, the public is entitled to protection against an inferior and adulterated product.

Freund on Police Power, Section 32.

~~Schwindinger~~ v. Chicago, 226 U. S., 587.

Schmiedinger

If a **state law**, such as the Arkansas law, results practically in the production of an adulterated commodity, does not the state owe to the public the obligation of removing the evils thus attendant upon such legislation? To be sure, the laws of competition are sufficient to remove the evils; but the **burden** of removing

them is cast upon the **employers** who must install expensive washing machinery and other like devices in order to alleviate a condition which is the direct result of legislation of the state. Sound public policy dictates that the state shall by legislation alleviate evils which it has ~~created~~ ^{created} by legislation, rather than that the burden of alleviating such evils so created shall be cast upon private individuals. So, we think that it is clear that there is a direct and obvious connection between the public purpose to be served by the main provision of the Ohio law and the peculiar features of that law which have been discussed in this brief. These features, we submit, constitute necessary and appropriate means for the accomplishment of the ultimate purpose to be served by the whole law and are therefore clearly within the police power of the state.

The complaint is made in the brief of appellant as well as in the bill that the fixing by the state of standards of purity and fineness for the purpose of safe-guarding against the evils otherwise attendant upon the enforced adoption of the mine-run system of compensation, constitutes an interference with a private business. Of course this is true in the academic sense. The mere fixing of the mine-run system itself, by a law similar to that under review in *McLean v. Arkansas*, involves an interference with the conduct of private business. Such additional interference as the Ohio law embodies, presents a difference of degree and not of kind. But this court has frequently decided that the mere fact that an incidental regulation involves an interference with a private business does not impair the validity of such a regulation if the same be merely appropriate to the

accomplishment of some main purpose which is within the legislative power.

Interstate Commerce Com. v. Goodrich Transportation Co., 224 U. S., 192.
Flint v. Stone-Tracy Co., 220 U. S., 107.

Before leaving this point, we call to the court's attention that means other than those found in the present act have been selected by the Ohio legislature for the prevention of the evils attendant upon an over-production of slack or fine coal. Such evils are not limited to the effect of such a practice upon the quality and value of the product. There is an element of public safety which is also involved, in that what is known as "shooting from the solid" is a highly dangerous proceeding. In addition, therefore to the powers of the Industrial Commission under Section 3 of the Ohio law the legislature has created other restraints tending to avoid such abuses. They are embodied in an act passed at the same session of the General Assembly of Ohio, and found in 104 O. L., 161. We need not quote this act here as it is not directly involved, but may describe it by saying that it prohibits "shooting from the solid", except upon permission of the Industrial Commission.

We think that the previous discussion has established five conclusions which we may state as follows:

1. There is a direct and obvious connection between Sections 2 and 3 and other similar provisions of the Ohio law and the subject matter affected by the remaining provisions of the act.

2. These peculiar features of the Ohio law are aimed at the correction of conditions that constitute public evils.

3. Such conditions are those which are produced by the practical operation of a mine-run law without such provisions as are peculiar to the Ohio legislation.

4. The peculiar features of the Ohio law are effective to obviate the evils at which they are aimed; or at least in advance of experience under the law, they will be presumed for the purpose of this case to be efficacious.

5. Therefore the mere fact that these peculiar provisions in the academic sense involve a further restraint upon the liberty and contract and (possibly) a further deprivation of the property of the operators, and that they constitute an interference with the conduct of a private business, do not make them invalid as an exercise of the state police power; for, where a given measure is promotive of the public good by being intended to obviate an established evil, and where it is a means chosen for the accomplishment of an end admittedly within the police power of the state it may, and as a matter of course, must interfere with private interests, and such interference will not make such legislation void.

There remains but one final word on this branch of the case, and that is that there is nothing in the case to justify the belief that the means taken by the Ohio legislature to safe-guard against evils which otherwise follow from the operation of a mine-run law, are more drastic than the interests of the case require. That such is the case has been argued by appellant's counsel: but they offer nothing as a substitute safe-guard against the evils in question excepting the ability of the operator to protect himself and the public by the exercise of his rightful control over his own business and employees.

That this control will not suffice to obviate the evils is established beyond peradventure by the testimony taken before the Commission, which testimony was that of the representatives of the operators themselves.

We, therefore, submit that the differences which exist between the Ohio law and the Arkansas law, so far from being such as would make the former unconstitutional, are in point of fact such as to remove objections which might be (and have been) made to the constitutionality of a law like the Arkansas law; and that upon no hypothesis whatever can the Ohio law be held unconstitutional on account of these peculiar provisions, so long as the constitutionality of the Arkansas law is sustained. *Therefore, in so far as the Fourteenth Amendment* of the Federal Constitution is concerned the appellant has not made out a case for its protection.

The Business of Mining Coal Has Become Charged With a Public Interest.

The court below intimated that the Ohio act under review here might be sustained upon the independent ground suggested by the citation of the case of German Alliance Insurance Co. v. Lewis, 233 U. S., 389.

There was plenty of testimony before the Ohio Coal Mining Commission, as will be disclosed by its report, that under the screen coal system of compensation the tendency on the part of the employees is not to clean out of the coal rooms coal that would pass through the screen and, therefore, ~~could~~ not enter into their compensation, although such coal was a marketable product, and if left in the mine would be forever lost. The Commission's report shows also that some coal mines in Ohio have been exhausted. The Coal Mining Commission deals ~~in~~ ^{with} this subject at pages 13 et seq., of the report.

We do not think the question suggested is an important one in this case because it is a consideration affecting the entire act rather than merely those portions of the act which are peculiar to it as a mine-run law in distinction from the laws of the type involved in *McLean v. Arkansas*. Other grounds being sufficient to sustain the act in the main and in detail, at least against objections to it raised under the federal constitution, it is scarcely necessary for us to rely upon this point very strongly. However, we believe that the lower court was right and that the business of mining coal, by reason of the character of the operation, has become charged with a public interest; though we admit that old decisions can be found to the contrary.

Let the case of *Millett v. People*, 117 Illinois, 294, cited by counsel for appellant at page 18 of their brief, be examined. We do not criticize this decision as being incorrect on the merits of the case then before the court, because at the time it was rendered it stated what was undoubtedly the law, in the main. However, the reasoning involved in the case is false in several particulars. In the first place the statement is made that mining for coal was not by the common law affected by a public use. This is true; but neither was the business of insurance affected by a public use by the common law; and this is the very ground-work of the opinion in *German Alliance Insurance Co. v. Lewis*, *supra*, as we understand that case. The common law is not fixed and unchangeable set of rules; it is an organically growing body of principles. The principles, it is true, remain the same, but the application of the principles varies as social conditions change. Therefore the mere fact one cannot find

any decision or precedent for holding that the business of mining coal is charged with a public interest does not suffice to prove that it has not become so charged. Again in *Millett v. People*, *supra*, the court says:

“The owner of a coal mine is under no obligation to obtain a license from any public authority and therefore when he chooses to mine his coal he exercises no franchise.”

This is an egregious instance of false logic. It is a palpable begging of the question. In *Wyman on Public Service Corporations*, Sections 50 and 90, will be found a full statement of the true principles underlying the charging of a business with public use. It is not a test to determine whether a business is charged with a public use or not that a license or franchise may be required for its transaction; rather it is the opposite which is true, viz., that the power to make the transaction of a business a franchise rests upon whether or not it is charged with a public interest.

Another statement made in *Millett v. People*, *supra*, is that:

“The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wheat or turf or even to the owners of grain, domestic animals or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country.”

This statement is palpably untrue. It is true that coal as a commodity is a necessity, and has this one thing in common with the other commodities mentioned by the court. But to say that the public are not compelled to resort to mine owners any more than they are

compelled to resort to the owners of grain carries its falsity on its face. For the owner of grain can plant and reap in a single year. Out of a single field he can produce an indefinite number of crops. Not so with the owner of a mine. When he has abstracted from the geological strata which he owns all of the coal which he cares to take out and has permitted the roof of the mine to cave in, thus making it practically impossible for another person to get what remains, no more coal will ever come out of that mine.

Now, it is pointed out in Wyman on Public Service Corporations (and this author does not class coal mines as public utilities) that the element of natural monopoly is at the foundation of the doctrine of public interest in a business. Limitations upon sources of supply, difficulty of distribution and the like are the things which charge a business with a public interest. As long as there was plenty of coal the limitations on the supply, though theoretically existing, were of no practical importance; but just as soon as conditions got to the pass described by the Ohio Coal Mining Commission on the pages of its report above cited, a change takes place. The supply of coal becomes limited and the public interest requires that it be preserved in as economical manner as possible. In short, when the supply of coal has diminished to a certain point, whatever that point may be, the public interest in conserving that supply and husbanding it as a natural resource becomes paramount to the private interest of the owner and operator of the mine.

We need not discuss this point further in this connection, although we shall have occasion to refer to it when

discussing the application of a recent amendment to the Constitution of Ohio.

Appellant's counsel are disposed to admit that if it can be established that the business of coal mining is charged with a public interest there is an end to the case. In this we agree with them; and submit that the business of mining coal has, in Ohio, become charged with such public interest by limitation of the source of supply of the commodity; and that for this reason alone the decision of the lower court should be affirmed.

Penalties.

Appellant complains that the penalties fixed by Section 6 of the act are so excessive as to preclude recourse to the federal courts for the purpose of testing the law, and that they are therefore unconstitutional under the rule laid down in *Ex Parte Young*, 209 U. S., 123.

We submit that in order to sustain this claim the following elements must be established:

1. The validity of the statute for violation of which penalties are imposed must not have been finally determined.
2. The action in which this kind of an attack is available must be one in which the penalties are sought to be enforced or in which their enforcement is sought to be prevented.
3. The penalty provisions must be so bound up with the remainder of the act that they cannot be separated from it.
4. The penalties themselves must be so enormous and unreasonable as that the inference must arise that they

were designed to prevent recourse to the courts except at peril of deprivation of property or liberty.

ExParte Young, Supra.

United States v. Delaware & Hudson R. R. Co.,
213 U. S., 366, 417.

Western Union Telegraph Co. v. Richmond, 224
U. S., 160, 172.

The penalty provided by Section 6 of the Ohio act does not satisfy these tests. In the first place this penalty (which is the only one provided by the act of which appellant can complain) is prescribed for the offense of passing coal over a screen or other device for the purpose of ascertaining the amount to be paid for mining or loading such coal whereby the total weight thereof shall be reduced or diminished. That is to say, this penalty constitutes the sanction of that portion of the law which is like the Arkansas law. The other portions of the Ohio law which have been made the subject of complaint under the Fourteenth Amendment are enforced by the sanction of penalties **to be imposed upon the employes.**

It is our contention that there has been a final determination in the McLean case of the validity of that part of the statute for violation of which the penalties are imposed; so that we have here a case described in the opinion in Ex Parte Young, at page 146 as "one very different from that here presented".

In the second place the nature of this proceeding is such as that the question is not properly raised in this case. There is no actual or immediately threatened effort on the part of the state to enforce this penalty against appellant.

In the third place the penalty provided for in Section 6 is clearly separable from that part of the act the constitutionality of which has not been finally determined. It is true that the penalty cannot be separated from Section 1 of the act, but as we have hereinbefore pointed out, the remaining sections of the act, concerning which the complaint under the Fourteenth Amendment is particularly made, in this case, are to be enforced by independent sanctions clearly separate and distinct from the penalty prescribed by Section 6.

In the fourth place the penalty is not itself excessive. This was determined by the court below; but in this connection we may step aside to remark that a minimum penalty of \$300 for each separate offense is not made excessive solely by reason of the fact that one day's violation of the law by appellant would subject it to penalties aggregating \$800,000. If the fine were \$50 instead of \$300 the aggregate would still be in excess of \$130,000 for a single day's violation on the part of the appellant. That is to say, the fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum.

For the foregoing reasons and upon the foregoing authorities as well as in view of more recent decisions of this court such as *Wilcox v. Consolidated Gas Co.*, 212 U. S., 19; *Grand Trunk Railway Co. v. Michigan Railroad Commission*, 231 U. S., 457, and the *Ohio Tax Cases*, 232 U. S., 576, we submit that the whole act should not be held invalid on account of the penalty prescribed by Section 6 thereof.

THE OHIO CONSTITUTION.

1. Alleged Delegation of Legislative Power.

Appellant in its bill complains of the Ohio act that it violates the constitution of Ohio in several respects. One of these complaints is the familiar one respecting alleged delegation of legislative power. It is scarcely necessary for us to notice this contention in view of the explicit rule of action laid down by the law itself for the guidance of the Industrial Commission, and in view of the multitude of authorities available on the question, some of which are cited by Mr. Justice Pitney in his opinion in *Plymouth Coal Co. v. Pennsylvania*, *supra*.

In fact, we submit that the very fact that the orders of the Industrial Commission of Ohio are subject to review by the Supreme Court of the state itself disposes of the thought that the power which is committed to the commission is legislative. If the Commission can make law then the court would be bound by its orders.

So far as the interpretation of the Ohio Constitution in this particular by Ohio courts is concerned, we refer the court to the cases of:

- Board of Health v. Greenville, 86 O. S., 22.
- Fairview v. Giffey, 73 O. S., 183, 189, 190.
- Rose v. Baxter, 7 Ohio N. P. n. s., 132 (affirmed without report, 81 O. S., 522).
- Theobald v. State, 30 C. C., 336.
- Railroad Co. v. Commissioners, 1 Ohio State, 77.

2. Decision of the Ohio Supreme Court in the Case of In Re Preston, 63 O. S., 428.

We have shown in this brief that the safe-guards which constitute the peculiar provisions of the present Ohio law are sufficient to distinguish it from the law held unconstitutional by the Ohio Supreme Court in the case above cited, upon the very reason embodied in the opinion and syllabus of that decision.

In addition to this fact, however, In Re Preston cannot be regarded as controlling the instant case with respect to the interpretation and application of the Ohio Constitution, for the reason that constitution itself has been materially changed since that case was decided. We refer the court to Sections 34 and 36 of Article II of the Ohio constitution as adopted in November, 1912, and effective June 1, 1913. They are as follows:

Section 34. "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees, and no other provision of the constitution shall impair or limit this power."

Section 36. "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods

of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

We submit, upon the reasoning embodied in the decision in the McLean case, which is sufficient for that purpose, that the main features of the Ohio law (which are the only ones which could possibly be affected by the decision in the Preston case, for reasons which have already been pointed out) constitute a law for the "general welfare" of the employes in operating mines within the meaning of Section 34 of the constitution.

Counsel are unable to destroy the force of this point by what they say at pages 52 to 54, inclusive, of their brief. Their argument, reduced to the simplest terms, is merely that the plain purport of the constitutional provision is to withdraw the conflicting rights of others than employes from the protection of the bill of rights of the Ohio Constitution; but that this could not be the case because that would be a "monstrous supposition". "Monstrous" though the supposition may be, it is impossible to avoid the interpretation of the Ohio Constitution which counsel themselves tacitly acknowledge is the primary meaning thereof.

But we prefer to base our claim for special legislative power to enact a law of the kind, despite the previous decision in the Preston case, upon the rather more explicit language of Section 36, and particularly the last clause thereof. Counsel have complained throughout their brief that in effect the Ohio legislation regulates the methods of mining and **pro tanto** interferes with a private business. Here we find that so far as the Ohio Constitution is concerned the legislature of the

state is given explicit power to regulate the methods of mining.

There are two ideas contained in the entire Section 36. One is the idea of conservation and the other is the explicit grant of power to regulate certain businesses. There may be, however, a relation between the two. We may briefly develop them together.

We say that the latter part of Section 36 furnishes explicit and direct authority for legislation of this kind in a palpable effort to avoid the consequences of the decision in the Preston case. We do not acknowledge that the Ohio Constitution is even doubtful of import on this point, but if it is doubtful, then, upon principles which are well understood, we beg leave to submit the following quotation from the Debates of the Constitutional Convention of 1912, which framed Section 36 of Article II:

“Mr. Tetlow: Believing that this convention has reached a stage in its proceedings when we should have more action and less words, I have condensed into a few words my views on the question now under consideration.

“The subject matter contained in this substitute proposal is of great import to this great commonwealth and will grow in magnitude with each passing year, and I feel that we living in this age owe to the coming generations the preservation of our natural resources, that fundamentally belong to them as well as to us. This proposal, if adopted, will give the law-making power of the state authority to provide for the conservation of all our natural resources, to adopt and regulate systems of mining that will tend toward the preservation of life, prevent the waste of minerals and provide for the measuring of coal. The principal mineral of this state and nation is coal, and being familiar with that industry I shall illustrate from that standpoint. The

natural resources of this nation have been chiefly responsible for its wonderful progress, and coal has contributed most largely to its success. * * * The production of coal in the United State from 1814 to the close of 1910, including anthracite and bituminous coal, was 8,243,351,259 tons, and according to Dr. J. A. Holmes, director of the national bureau of mines, we have lost, never to be recovered, by our wasteful and destructive methods of mining approximately 5,000,000,000 tons of coal, and from my personal knowledge of mining conditions I know we lost about 40 per cent. through our national methods of mining. Consequently I feel that Dr. Holmes in his estimate of loss is approximately correct. Since 1872 Ohio has produced approximately 600,000,000 tons of coal, and at the rate of loss indicated our loss in this state will approximately be 240,000,000 tons. Ohio produced in 1910, 34,424,951 tons. In 1911 the Ohio tonnage was 30,342,039 tons. At the same ratio of loss in the last two years, Ohio lost over 25,000,000 tons that can never be recovered.

“In European countries and under their system of mining over 90 per cent. of the coal is mined and consequently less than 10 per cent. is lost, which shows conclusively our weakness, and it also reflects discredit upon the system we employ.

* * * * *

“In speaking of the great loss of human life in our mining industry I do so with deep and mingled feelings; and many, many times have these words burned into my very soul that ‘man’s inhumanity to man makes countless thousands mourn.’ Yes, my friends, I have spent my entire life in and around the mines, and I have seen hundreds of my fellow workmen go to needless and untimely graves, but with all that I haven’t yet lost faith in mankind, and when the time comes that human life is placed above dollars justice will begin to reign.

* * * * *

“I submit for your consideration a brief statement of the mortality in the mines.

* * * * *

"In European countries the mines are worked principally on what mining men term 'long-wall advancing' or 'long-wall retreating.' By this system practically all the coal is taken out and the traveling and hauling roads are protected by artificial walls built of rock or slate, the old workings of the mines are quickly closed by the pressure and weight of the overlying strata and it leaves no space in the old abandoned workings for the accumulation of gas or coal dust.

"In this country the principal method used in mining is known as the 'room and pillar' system. About 60 per cent. of the coal is mined by this process and about 40 per cent. that is not recovered is used for pillars, which in the end is false protection, because in the old abandoned workings a condition is created that is dangerous. Proper ventilation is rendered impossible and the old and abandoned workings become a storage place for gas or coal dust, which all the elements that cause all of our mine explosions.

"In dealing briefly with mine explosions I desire to make in the beginning the unqualified statement that every one of the catastrophes due to explosions could be prevented. As I heretofore stated, there were two elements that furnished the basic cause of explosions, inflammable gas and coal dust. The inflammable gas encountered in mines, known as marsh gas or commonly called fire damp, creates its greatest destructive powers when the atmosphere becomes charged with about seven per cent. of the gas. When the percentage of gas is below three per cent. it will not ignite. Consequently if the sections of the mines are properly ventilated gas can be diluted and rendered harmless and driven from the mine. Coal dust is more dangerous and deadly than gas because it is more difficult to remove, but if the mines in the dry sections are sprinkled and the air currents charged with moisture by artificial means, or the dust is removed, the danger could be eliminated. The greatest handicap in proper ventilation and cleansing dust from the mine to protect life and

property is our present 'room and pillar' system. If we adopt European methods we will be able to more adequately protect life and conserve our mineral resources. I recognize that the one great crying need in the mining district is national regulation to circumvent the stone-age cry of competition that arises when a single state attempts to rectify existing wrongs. **My reason for wanting a constitutional provision giving authority to enact laws regulating the measuring and weighing of coal is to protect life and prevent fraud.** For many years the miners have endeavored to have their employers pay them upon the basis of 'mine-run,' or for all the coal they produce, but they have never succeeded, and they, in their weakness, have been denied justice by the strong. At present the miners of the state are paid only for coal that passes over a screen having an area of 72 superficial feet, with a mesh supposed to be an inch and a quarter between the bars, and the amount of nut coal and slack passing through the screen will average about 35 per cent.

"One thing about these screens that is self-evident is that the coal passing over and through them wears the bars and increases the size of the mesh. Thereby injustice is done for the wearing of the screen never favors the miners. From personal observation I have seen screens so worn that the miners were losing fully 10 per cent. of earnings that rightfully belonged to them. You may ask why the miner would permit such a condition, but he usually suffers in silence for fear of discrimination. So with all his latent slumbering power he is oppressed through his own weakness.

"In 1898 a law was passed in this state 'to provide for the weighing of coal before screening' for the protection of miners, but it was declared unconstitutional by our Supreme Court, while the same kind of a law has been held constitutional in West Virginia, Kansas and Illinois. The Ohio court held that the law was an unwarranted invasion of the right of contract and that it placed a premium upon incompetency. I contend that our state has, under its legislative branch of government, the right to

regulate the conduct of its citizens toward each other and the manner in which they shall use their property when the regulation of such is necessary for the public good.

"If there were any basis for the action of the court in declaring that the law placed a premium upon incompetency at that time that claim cannot be raised now, because a complete evolution has taken place in the industry. At that time the great majority of our tonnage was produced by the hand-pick method, and there being no sale for fine or slack coal, the employers took exceptional care in selecting practical workmen because the less fine coal produced the greater returns on their investment. The present conditions are directly opposite. Of the 34,424,951 tons produced in our state in 1910, 30,083,468 tons was mined by machinery, so that the machine now does the under cutting that required the practical miner in the past. The fine coal has become a valuable commodity, due to the patent stokers and modern methods of extracting the head units from fine coal, and the more fine coal produced the more goes through the screen and the greater become the returns of the employer. In the past the practical miner was in demand; now the inexperienced miner who produces the most fine coal is in demand.

"Right here I desire to make a statement that in Illinois and West Virginia, where they have the mine-run system and where the miners are paid for all the coal they mine, they have increased their tonnage production to a greater extent than any other states in the Union in the last decade.

* * * * *

"All we ask is that we be paid for that which is marketable coal, coal which can be sold in the market. There is no reasonable objection to the proposition, and it will not prevent the operator from screening the coal and making different grades to meet market requirements.

"Mr. Hoskins: Is there any provision in the present constitution under which these regulations cannot all be made by statute?

"Mr. Tetlow: Because the Supreme Court in this state decided in 1900 that it was an invasion of the right of contract and that it set a premium upon incompetency. But conditions have changed and I am satisfied if our court today had to rule upon the same question it would hold it constitutional because of these changed conditions. Practically all of our coal at that time was mined by the hand-pick method. There was not any sale for fine coal, only for lump coal, and the fine coal was lost, but conditions have changed. Patent stokers have come into use. Fine coal is marketable; in fact if you go into some of the state institutions of this state you will find they are using fine coal the miners do not get paid for."

* * *

(Remarks of Mr. Percy Tetlow, delegate from Columbiana county, in the Constitutional Convention of Ohio, Wednesday, April 17, 1912. Proceedings and Debates, Vol. II, pp. 1280, 1281.)

If this court were an Ohio court, we would ask it to take judicial notice of what is a fact well known in Ohio, viz., that Section 36 or Article II was discussed by the people, when it was before them for adoption or rejection, upon the understanding that it would make possible the enactment of what was popularly termed an "anti coal screen law." Is it not at least significant, that, as shown by the resolution authorizing the appointment of the Coal Mining Commission, above cited and referred to, one of the very first bills introduced into the first session of the General Assembly of Ohio, following the adoption of the constitutional amendments, was a bill relating to the method of weighing coal at the mines when the employees are to be paid for their labor on the basis of weight or other quantity?

So, we say that Section 36 of Article II, on its face, grants **special** authority to the Ohio legislature to pass

an act of this character and changes the constitution from what it was when the Preston case was decided; and that this was the general and popular understanding of the purport of this provision when it was submitted to the people for their adoption or rejection.

With respect to conservation, the intent of the whole section is very clearly expressed. Water power, coal, oil, gas and other minerals are regarded as "natural resources" which are to be conserved. Conservation is to be by way of "the regulation of methods of mining, weighing, measuring and marketing" the minerals mentioned. It is probably true, as counsel insist at page 54 of their brief that the laws to be passed for this purpose must have regard to the constitutional rights of the proprietors of such resources, but these very constitutional rights themselves are always subject to the social interests, as Article I, Section 19 of the Ohio Constitution provides that "private property" shall ever be held inviolate but subservient to the public welfare."

What Article II, Section 36 of the Ohio Constitution does is to declare the public interest in the natural resources of the state. As pointed out in *German Alliance Insurance Co. v. Lewis*, supra, the degree of the public interest in property or business of a given kind may change; and in the course of time and the development of the social order the public interest may tend to become in new respects paramount to the private interests.

Absolutely to deprive the owners of valuable property without compensation under the guise of conserving natural resources is one thing; regulating, in the interest of the public, the use of property which constitutes a natural resource, so as to deprive the owners of mere

incidental property rights, is an entirely different thing, as pointed out in the Opinion of the Justices (Maine, 1908), 69 Atlantic, 627, 19 L. R. A. n. s., 422. The present Ohio statute controls and regulates the operation of coal mines, to give it the extreme effect contended for by appellant. It does not deprive the owners of coal mines of their general property in the mines or in the coal in place; nor, except in a very limited sense, does it interfere with the management of the business of mining coal or with the **jus disponendi** attaching to ownership of the coal. Therefore, it seems to us that, accepting counsel's interpretation of Article II, Section 36 of the Ohio Constitution, the present act constitutes a direct exercise of the special legislative power provided for therein.

The court will presume, of course, that **some change** was intended by the people of Ohio when they adopted this section. Hence, it stands to reason, we think, that *In Re Preston*, supra, even if it were not distinguishable on grounds hereinbefore discussed from the present case, cannot be regarded as an interpretation of the Ohio Constitution as it is today in its application to legislation of this sort.

Generally, on the question of the right of the state to conserve its natural resources, we cite *West v. Kansas Natural Gas Co.*, 221 U. S., 229, wherein the court, speaking through Mr. Justice McKenna, says:

"The right of the state 'to preserve the common supply (of natural gas) for the equal use of all owners' is not denied by appellees. We put the question out of consideration therefore, except incidentally, and concede the right of the state to preserve the supply of gas."

There is another line of decisions of this court, which, while not directly involving the idea of conservation of natural resources, do involve the principle that regulation of private property rights not amounting to a direct taking of the property itself is sanctioned under the police power.

Barrett v. Indiana, 229 U. S., 26, 29.

Ohio Oil Co. v. Indiana, 177 U. S., 190.

Hudson Water Co. v. McCarter, 209 U. S., 349.

Wilmington Star Mining Co. v. Fulton, 205 U. S., 60.

Further, as to the distinction between a "comparatively insignificant taking of private property" and a substantial expropriation, see *Noble State Bank v. Haskell*, *supra*, at page 110.

Of course, we would not contend that the State of Ohio could by direct constitutional provision, any more than by legislation, take private property without compensation to an extent not justified by the public welfare, but in this case (always assuming that there is an actual taking of private property, which we question) the property right taken by the state is insignificant, the public interest in the supply of coal in place is demonstrable from the facts found by the Ohio Coal Mining Commission and is recognized and made paramount **to the extent, at least, to which it is asserted as such** through the act here involved, by Article II, Section 36 of the Constitution of Ohio.

We submit, therefore, that *In Re Preston*, *supra*, in so far as it might be considered as a case supporting the contention of appellants (and it does not seem to us to support their contention) is not an authoritative inter-

pretation by the highest court of Ohio of the meaning and application of the Ohio Constitution. We also submit (having discussed the two questions together) that the extent to which (if at all) the Ohio law involved in the present case takes private property, is no greater than that to which the legislative power of the state extends when asserted in order to conserve the natural resources of the state, the exhaustion of which, under the methods of production heretofore in vogue, can be clearly foreseen.

For a discussion of other points raised by the bill but not dwelt upon in appellant's brief, under the Constitution of Ohio, we refer this court to the opinion of the court below. Indeed, upon all points in the case with the exception of one or two, which we have raised for the first time in this court, we think the opinion of the District Court is convincing and conclusive.

CONCLUSION.

We have tried, in the foregoing brief, to establish the following points, which, as we summarize them, we submit to the court:

1. In so far as the Ohio law enjoins upon the mining industry of the state the use of the mine-run system of compensation, it is sustained as against objections made under the Fourteenth Amendment of the federal constitution, on the authority of *McLean v. Arkansas*, *supra*.

2. The appellant being a corporation cannot be heard to complain of any supposed deprivation of liberty of contract, through the peculiar features of the Ohio law.

3. Sections 2 and 3 of the Ohio law and the other provisions thereof are dependent upon them do not in a real sense deprive the coal operators of property.

4. The alleged deprivation, whether of property or liberty, involved in the sections of the Ohio law above referred to is unreal and illusory and the coal operators have no cause for complaint under the Fourteenth Amendment on account of the effect of the law upon their property and business.

5. The objections made in the appellant's brief to the peculiar features of the Ohio law are not well taken.

6. Sections 2 and 3 of the Ohio law and the other provisions dependent upon them constituting the features peculiar to that law, as compared with the Arkansas statute sustained in the McLean case, are appropriate and necessary incidents to the accomplishment of the main purpose common to both acts, in that they aim to avoid real public evils attendant upon legislation of this general character, and constitute the only effective means of avoiding such evils; nor are these provisions more conventionally compulsive in character than the evils to be remedied require.

7. The business of coal mining, under the facts developed in the inquiry out of which the Ohio legislation grew, has become charged with a public interest.

8. The penalties imposed by Section 6 of the act are not excessive; nor is the question of penalties properly made in this case.

9. The sections complained of by appellant do not embody any delegation of legislative power.

10. The early decision of the Ohio Supreme Court in the case of *In Re Preston*, *supra*, is not an interpretation

of the present Ohio Constitution; nor is the act involved in the case at bar subject to the criticisms made by the Ohio court in the Preston case against the act then before that court.

11. The constitutional amendment which has obviated the application of *In Re Preston*, declares the policy of the state with respect to the conservation of its natural resources; while the act questioned in this case, being merely regulatory in character, goes no further than the legislative power of the state may proceed in the accomplishment of this purpose.

While we have argued the questions involved in this case at some length in this brief, we feel that the previous decisions of this court so far rule the case at bar as in fact to make these questions **frivolous**, within the meaning of the rules of the court. That every intentment favors the constitutionality of a statute, is a principle so well established as to need no citation of authorities. In the case at bar, however, the presumption hardly need be brought to the support of the legislation of Ohio; for no objection is made to its constitutionality that is not fully disposed of by some previous decision or else is not wholly unsupported by reason or authority.

We respectfully submit that the decision of the District Court should be affirmed.

Timothy S. Hogan,
Attorney General of Ohio.

Clarence D. Laylin,
Robert M. Morgan,
James I. Boulger,
Of Counsel.

RAIL & RIVER COAL COMPANY *v.* YAPLE, ET AL.,
CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO.

No. 513. Argued December 1, 1914.—Decided February 23, 1915.

A state police statute regulating the basis for compensation of miners on the run of the mine subject to regulations of an industrial commission, but which makes the orders of the Commission only *prima facie* reasonable and provides for their prompt judicial review and which does not prevent employers from screening the coal as they desire for marketing it, amply protects the rights of the employers. Only alleged infractions of the constitutional rights of those attacking the statute can be considered in determining its constitutionality. That a State may, without violating the due process provision of the Fourteenth Amendment place reasonable restraints upon liberty of contract, *Chicago &c. R. R. v. Maguire*, 219 U. S. 549, applies to prescribing methods for compensation of miners for producing coal. *McLean v. Arkansas*, 211 U. S. 539.

Coal mining is a proper subject for police regulation, and it is for the legislature of the State to determine, so long as its action is not arbi-

236 U. S.

Argument for Appellant.

trary, the measure of relief in regard to evils to be corrected in connection therewith.

It is not the province of the court to revise conclusions which men versed in a business have found practicable; nor will this court do so in advance of the law authorizing a commission composed of such men to prescribe regulations being put into effect.

A state police statute will not be declared unconstitutional as denying due process of law on the ground that the penalties are excessive in a suit brought to enjoin the enforcement of the statute and in which penalties are not involved; nor where, as in this case, the penalties are not so excessive as to prevent a resort to the courts to test the constitutionality of the statute.

The Ohio Run of Mine or Anti-screen Law of 1914 is not unconstitutional under the due process provision of the Fourteenth Amendment either as taking the property of employes without due process of law, or by denying them an opportunity to be heard, nor by unreasonably abridging their liberty of contract nor for prescribing unreasonable conditions as to screening the coal and ascertaining the amount of impurities therein by the Industrial Commission, nor does it exceed the power of the legislature of the State under the constitution of the State.

214 Fed. Rep. 273, affirmed.

THE facts, which involve the constitutionality both under the Fourteenth Amendment to the Constitution of the United States and similar provisions of the constitution of the State of Ohio of the "Run of Mine" or "Anti-Screen" Coal Mine Law of 1914 of the State of Ohio, are stated in the opinion.

Mr. A. C. Dustin, with whom *Mr. Hermon A. Kelley* and *Mr. Paul J. Bickel* were on the brief, for appellant:

The Mine-run law deprives appellant of liberty and property without due process of law in violation of the Fourteenth Amendment.

The quality of coal to be produced is fixed by the Industrial Commission; the operator required to pay for coal conforming to Commission's standard regardless of its own needs. The amount of fine coal is fixed by the Commission.

The manner of production of coal is subject to regula-

tion by the Commission. The determinations of the Commission are based upon "proper mining" and not upon needs of operator's business.

Coal mining is a private business and coal lands are purely private property.

McLean v. Arkansas, 211 U. S. 539, sustaining the Arkansas act which was the basis of the decision, does not apply as the Ohio act is different from this Arkansas act.

The provisions in the Ohio act, depriving operators of freedom of contract and of control over their property are arbitrary, unreasonable and unnecessary because:

There are no practicable means of determining the amount of impurities unavoidable in proper mining, nor any practicable means of applying any such standard. No compensating public good results from these burdens; any standard other than that of marketability is useless; the operation of the percentage system will cause discord and trouble; the regulation provided by this act has no relation to purpose of law and is not incidental thereto.

The requirement that the operator pay for coal regardless of his needs is not a protection or benefit to anyone, but an arbitrary burden.

It is immaterial whether the Commission acts in good faith, or that a court review of the Commission's order is provided.

The Ohio act is beyond the bounds of police power.

This law is not intended for, nor justifiable on ground of, safety.

This law is not intended for, nor justifiable on ground of, conservation of natural resources.

The cases of conservation of oil, gas and water can be distinguished now as the conservation amendment of the Ohio constitution is applicable.

The penalties prescribed by the act are so excessive as to deprive appellant of equal protection of the law in violation of the Fourteenth Amendment.

This law is unconstitutional under the constitution of the State of Ohio.

The former mine-run law of 1898 was held invalid under Ohio constitution and the present law is more drastic than the former.

United States courts follow the State Supreme Court in regard to construction of state constitution.

The recent amendments to the Ohio constitution with reference to welfare of labor and conservation of natural resources do not abrogate or repeal the bill of rights of the Ohio constitution.

The present law is invalid under the holding of the Ohio Supreme Court.

In support of these contentions see *Adair v. United States*, 208 U. S. 161, 172; *Allgeyer v. Louisiana*, 165 U. S. 578; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 100; *Debitulia v. Lehigh Coal Co.*, 174 Fed. Rep. 886; *Eubank v. Richmond*, 226 U. S. 137, 144; *Ex parte Young*, 209 U. S. 123; *Express Co. v. Ohio*, 165 U. S. 194, 219; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; *Haire v. Rice*, 204 U. S. 291, 301; *Holden v. Hardy*, 169 U. S. 366; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; *Merchants Bank v. Pennsylvania*, 167 Oh. St. 461; *Minnesota v. Barber*, 136 U. S. 313; *McLean v. Arkansas*, 81 Arkansas, 304; *McLean v. Arkansas*, 211 U. S. 539; *Mo. Pacific Ry. v. Tucker*, 230 U. S. 340; *Muller v. Oregon*, 208 U. S. 412; *Nullett v. People*, 117 Illinois, 294; *Oakes v. Mase*, 165 O. S. 363; Ohio Constitution, Art. II, §§ 34 and 36; Ohio Laws, Vol. 93, p. 33 (Act of 1898); Ohio Laws, Vol. 104, page 181 §§ 1-7; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 202; *People v. Williams*, 189 N. Y. 131, 135; *Railroad Co. v. Ellis*, 165 U. S. 150, 153; *Railroad Co. v. Williams*, 233 U. S. 685; *Slaughter House Cases*, 16 Wall. 37; *Smith v. Texas*, 233 U. S. 630; *St. Germain Irrigating Co. v. Hawthorne Ditch Co.*, 143 N. W. Rep. 124, 127; *Sterritt v. Young*, 14 Wyo-

ming, 146; *Welch v. Swasey*, 214 U. S. 91; *Willcox v. Garrett*, 212 U. S. 19, 54; *Wilmington Mining Co. v. Fulton*, 205 U. S. 60.

Mr. Clarence D. Laylin, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, *Mr. Robert M. Morgan* and *Mr. James I. Boulger* were on the brief for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This case is brought here by appeal from an order of the District Court of the United States for the Northern District of Ohio, refusing an application for interlocutory injunction upon the petition of the Rail and River Coal Company, a West Virginia corporation, against Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio. The application was heard under § 266 of the Judicial Code before a Circuit judge and two District judges. The object of the bill was to restrain the Industrial Commission from putting into effect the so-called "Run of Mine" or "Anti-Screen" law of the State of Ohio, passed February 5th, 1914, by the legislature of that State, being entitled "An Act to Regulate the Weighing of Coal at the Mines." 104 Oh. Laws, 181. A copy of the Act is inserted in the margin.¹

¹ BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that as-

Summarized, the bill sets forth that plaintiff is engaged in the mining business in Ohio, owning a large tract of coal lands, of approximately 32,000 acres, upon which it has four coal mines properly developed, employing upward

certain and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this State, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the

of 2,000 persons; that in the State of Ohio there are about 600 coal mines, employing upwards of 45,000 persons; that in the year 1913 more than 36,000,000 tons of coal were produced, and there was expended in wages to said employes upwards of \$26,000,000; that the defendants are the members of the Industrial Commission of Ohio, vested by the legislature of that State with authority to enforce the provisions of the "Mine-Run Law"; that for many years mining has been conducted in the State of Ohio by the miners entering into contracts with their employers for a period of two years; that the last contracts expired on April 1, 1914.

The bill set forth the provisions of the act, and alleged that the same are unreasonable and arbitrary and impracticable in operation, and that the act is unconstitutional, as in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the constitution of the State of Ohio, and that it delegates legislative authority to the Industrial Commission of the State; and although the bill was filed before the act went into effect, it was alleged that the Industrial Commission in putting the same into effect would work an irreparable

provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

injury to the plaintiff. Upon application under this bill to the District Court, composed of three judges, the injunction was denied (214 Fed. Rep. 273), and the case is appealed to this court.

Under the system of wage payment and mining of coal in use before the passage of this statute, miners in Ohio were paid at a certain price per ton for screened lump coal, that is, for coal which, after it is mined and brought to the surface, is passed over a screen, the bars of which are one and a quarter inches apart. The report of the Ohio Coal Mining Commission, a public document, copies of which have been filed by counsel in this case, shows that that system of mining was regarded as objectionable by the miners, on the ground that they were not paid for mining of a considerable quantity of marketable coal, and there was dissatisfaction because of the wearing of the screens so as to increase the size of the apertures between the bars above the standard. In Ohio, as in some other States, there was much complaint because of this system. It appears that the employers generally desired to preserve the screened-coal basis of payment, and objected to the run of mine system, in which the miner is paid for mining coal as it is when mined without screening. Before enacting the legislation now in controversy in the State of Ohio, the question was referred to a Coal Mining Commission, which Commission, after full investigation of the subject, made the report referred to, in which it appears that the arguments pro and con were considered and reported upon, and a bill was recommended in the form in which the legislature passed the present law. The report of the Commission cannot be read without a conviction that there was an earnest attempt to eliminate the objections to the "run of mine" basis of payment to the miners, and to enact a system fair alike to employer and miner.

The principal objections of the employers to the run of mine system adopted in some of the States are: a tend-

ency to produce coal unduly mixed and mingled with slate, sulphur, rock, dirt and other impurities; and to yield an increased quantity of fine coal, to the loss of the employer.

As we have said, the result of the consideration of the objections to this system, by the Commission report, was the enactment of the present law.

Its first section shows that it attempts to substitute for the system theretofore in use in the State, where the terms of employment required payment for mining or loading coal on the basis of the ton or other weight, one by which the miner shall be paid according to the total weight of all the coal contained in the mine car in which the same has been removed from the mine; providing, however, that no greater percentage of slate, sulphur, rock, dirt, or other impurity shall be contained in the contents of such car than that ascertained and determined by the Industrial Commission of Ohio.

By the second section of the act, the Industrial Commission is required to ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity *unavoidable* in the proper mining or loading of such cars in the mines of the State. Evidently this section recognized and considered the objections to the plan of payment adopted in the first section, payment by run of mine, and provided for ascertaining by means of the Commission of the percentage of slate, sulphur, rock, dirt or other impurity, which evidently the lawmakers regarded as impracticable to prevent altogether in the mining of coal. In other words, the employer was not obliged to compensate the miner for everything sent up in the car, no matter how loaded with dirt and impurities. The object was to ascertain the amount of unavoidable impurities in proper mining, and place a limitation upon the miner to that extent.

In fixing the penalties for infractions of the act, § 7

penalizes the miner or loader for the contents of a car containing a greater percentage of impurities than that ascertained or determined by the Industrial Commission, and the miner for such infraction is made guilty of a misdemeanor and punishable upon conviction. Section 7 contains the important proviso that nothing contained in the section shall affect the right of a miner or loader and his employer to agree upon deductions by the systems known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

In other words, the ascertainment of the Industrial Commission which is provided in §§ 1 and 2 is not to be a limitation upon the right of the employer and miner to agree upon deductions of their own arrangement as to the amount of slate, sulphur, rock, dirt or other impurity permitted in the mining of coal. The employer and miner may substitute their own agreement in that respect for the ascertainment of the Commission, and the law fixes no penalty for the mining of coal with such measure of impurities as the employer and miner have thus agreed upon.

Section 3 makes it the duty of the miner and employer to agree upon and fix the percentage of fine coal commonly known as nut, pea, dust and slack allowed in the output of the mines, and where they do not agree, the Industrial Commission may fix such percentage, which percentage thus established shall remain in force until otherwise agreed upon between miner and employer, and the Commission, when it finds the percentage of fine coal as fixed by the Industrial Commission has been exceeded, may make, enter and cause to be enforced such order or orders as will result in reducing the percentage of fine coal to the amount fixed by it.

The report of the Coal Commission (pages 59 and 60) shows the consideration which that body gave to this subject in the interest of fair mining, and its desire to

obviate by this provision the undue production of fine coal to the disadvantage of the employer.

By § 5, the Industrial Commission is given power from time to time upon investigation to change the percentage by it ascertained and determined, or fixed by its previous orders.

The only penalty fixed by the law against the employer is contained in § 6, where it is made unlawful for the employer to pass the coal over a screen or other device, for the purpose of ascertaining and calculating the amount to be paid the miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished.

There is nothing in the law to prevent the employer from screening his coal as he sees fit for other purposes, and so as to fit it for the market, in such wise as he may deem advisable. The inhibition on screening is only upon that operation when it is done for the purpose of calculating the amount to be paid to the miner for mining the coal. Moreover, it is important to be considered in this connection that the orders of the Commission are not final, but are subject to review under the statute of Ohio found in 103 Ohio Laws, at page 95, where the orders of the Commission are declared to be only *prima facie* reasonable, and any employer or other person interested is entitled upon petition to a hearing upon the reasonableness and lawfulness of the order before the Commission, and under § 38 of the law, any employer or other person in interest, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio to vacate or amend any such order upon the ground that the same is unreasonable or unlawful, and the Supreme Court is authorized to hear and determine such action and may, in its discretion (§ 41) suspend all or any part of the order of the Commission. The statute makes provision for the prompt hearing of all such actions, in prefer-

ence to other civil cases, with some exceptions. It would seem that this system of law, with a right to review in the manner we have stated in the Supreme Court of Ohio, has provided a system ample for the protection of the rights of the employers (see *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 U. S. 531). And of course in this, as in other cases, only alleged infractions of constitutional rights of those complaining can be considered in determining the constitutionality of the law. *Southern Ry. v. King*, 217 U. S. 524, 534; *Rosenthal v. New York*, 226 U. S. 260, 271; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576.

The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S. 539, in which this court sustained a law of the State of Arkansas requiring coal mined to be paid for according to the run of mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing. *Schmidinger v. Chicago*, 226 U. S. 578; *Chicago &c. R. R. v. McGuire*, 219 U. S. 549, and cases therein cited and reviewed.

The contention that this law has no reasonable or legal relation to the object to be attained seems to us to be equally without foundation, in view of the recognized right of the legislature to regulate a business of this character, and to determine for itself, in the absence of arbitrary action, the measure of relief necessary to affect the desired purposes. That the law is within the authority

of the Ohio legislature, acting under the constitution of Ohio, there can be no question, in view of the authority conferred by that instrument in § 36, Art. II, which provides that "laws may be passed . . . to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

As to the alleged impracticability of the law, because of the impossibility of the Industrial Commission determining the quantity of dirt and other impurities in any coal mined, we can find no force in that objection. Agreements as to the amount of docking for dirt and impurities in the mining of coal have been constantly made, and it is not the province of a court to revise conclusions which men versed in the business have found practicable, certainly not in advance of an attempt to put the law into operation. The consideration of the law already given shows the means enacted to do away with these impurities, and to insure as far as possible the production of clean coal.

As to the objection because of the penalties, this is not a suit to enforce penalties; nor in view of the provisions of the statute can we say that the penalties are so great as to prevent a resort to the courts to ascertain the constitutionality of the law. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Grand Trunk Ry. v. Michigan Railroad Commission*, 231 U. S. 457; *Ohio Tax Cases*, 232 U. S. 576.

We are unable to discover in the statute any infraction of the constitutional rights of the appellant, and the order denying the temporary injunction is accordingly

Affirmed.